MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

R.H. BLOIS, Q.C. — Chairman

ELIZABETH LAWRENCE — Vice-Chairman

DARRYL WILSON, C.A., LL.B. — Member

* * * *

DEBI KARREL, B.P.E. — Clerk
CLYDE A. PAUL, LL.B. — Counsel

THIS VOLUME CONTAINS ALL ASSESSMENT DECISIONS FROM JAN. 1, 1984 TO DECEMBER 31, 1984.

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981.

DISCLAIMER RE: HEADNOTES

This volume of the 1984 decisions of the Nova Scotia Municipal Board contains Headnotes which summarize the decisions. These Headnotes are not part of the decisions. The Municipal Board while it has authorized and approved of the publication of these Headnotes assumes no responsibility for the content or the accuracy of the Headnotes.

ASSESSMENT

CASE TABLE

Ali v. Director of Assessment 255

Atlantic Wholesalers Ltd. v. Director of Assessment 61

A.W. Peter's Enterprises Ltd., Director of Assessment v. 91

A.W. Peter's Enterprises Ltd., Director of Assessment v. 327

Ballou v. Director of Assessment 373

Clay v. Director of Assessment 35

Conrad v. Director of Assessment 235

Day v. Director of Assessment 357

DeMille v. Director of Assessment 225

Diab v. Director of Assessment 13

Director of Assessment, Ali v. 255

Director of Assessment, Atlantic Wholesalers Ltd. v. 61

Director of Assessment v. A.W. Peter's Enterprises Ltd. 91

Director of Assessment v. A.W. Peter's Enterprises Ltd. 327

Director of Assessment, Ballou v. 373

Director of Assessment, Clay v. 35

Director of Assessment, Conrad v. 235

Director of Assessment, Day v. 357

Director of Assessment, DeMille v 225

Director of Assessment, Diab v 13

Director of Assessment, Eaton's Ltd. v. 267

Director of Assessment, Hudson's Bay Co. Ltd. v. 85

Director of Assessment, Hume v. 159

Director of Assessment, v. J. Duncan C. Motels Ltd. 45

Director of Assessment, Knickle v. 215

Director of Assessment, Lebanese Association of Nova Scotia v. 19
Director of Assessment, Leribest Holdings Ltd. v. 1
Director of Assessment v. Lord Nelson Hotel Ltd. 173
Director of Assessment, Lord Nelson Hotel Ltd. v. 173
Director of Assessment, McKay v. 307
Director of Assessment, Oxford Frozen Foods Ltd. v. 113
Director of Assessment, Van Tassell v. 139
Eaton's Ltd. v. Director of Assessment 267
Hudson Bay Co. Ltd. v. Director of Assessment 85
Hume v. Director of Assessment 159
J. Duncan C. Motels Ltd., Director of Assessment v. 45
Knickle v. Director of Assessment 215
Lebanese Association of Nova Scotia v. Director of Assessment 19
Leribest Holdings Ltd. v. Director of Assessment 1
Lord Nelson Hotel Ltd., Director of Assessment v. 173
Lord Nelson Hotel Ltd. v. Director of Assessment 173
McKay v. Director of Assessment 307
Oxford Frozen Foods Ltd. v. Director of Assessment 113
Van Tassell v. Director of Assessment 139

ASSESSMENT

STATUTE TABLE

ASSESSMENT ACT, R.S.N.S. 1967, c.14

s.1(a)(v)
  Director of Assessment v. Oxford Frozen Foods Ltd. 113
  Director of Assessment v. A.W. Peters Enterprises Ltd. 91
  Director of Assessment v. A.W. Peters Enterprises Ltd. 327

s.1(a)(vi)
  Director of Assessment v. Oxford Frozen Foods Ltd. 113

s.1(eb)
  Ballou v. Director of Assessment 373
  Clay v. Director of Assessment 35
  Van Tassell v. Director of Assessment 139

s.1(ja)
  Eaton's Ltd. v. Director Assessment 267

s.1(naa)
  Director of Assessment v. Lord Nelson Hotel Ltd. 173
  Lord Nelson Hotel Ltd. v. Director of Assessment 173

s.1(nb)
  Clay v. Director of Assessment 35

s.2
  Director of Assessment v. Oxford Frozen Foods Ltd. 113

s.3(1)(d)
  Clay v. Director of Assessment 35

s.7(1)
  Atlantic Wholesalers Ltd. v. Director of Assessment 61
  Director of Assessment v. A.W. Peters Enterprises Ltd. 327
  Eaton's Ltd. v. Director of Assessment 267

s.7(1)(6)
  Director of Assessment v. A.W. Peters Enterprises Ltd. 327

s.7(2)
  Atlantic Wholesalers Ltd. v. Director of Assessment 61
  Eaton's Ltd. v. Director of Assessment 267
  Hudson Bay Co. Ltd. v. Director of Assessment 85
  Lebanese Association of Nova Scotia v. Director of Assessment 19
  Leribest Holdings Ltd. v. Director of Assessment 1

s.7(2)(a)(iii); (iv)
  Director of Assessment v. J. Duncan C. Motels Ltd. 45

s.7(3)
Eaton's Ltd. v. Director of Assessment 267

s.7(4)
Director of Assessment v. J. Duncan C. Motels Ltd. 45

s.17
Director of Assessment v. Lord Nelson Hotel Ltd. 173
Lord Nelson Hotel Ltd. v. Director of Assessment 173

s.20
Director of Assessment v. Lord Nelson Hotel Ltd. 173
Lord Nelson Hotel Ltd. v. Director of Assessment 173

s.22(1)
Van Tassell v. Director of Assessment 139

s.23(a)
Director of Assessment v. Lord Nelson Hotel Ltd. 173
Lord Nelson Hotel Ltd. v. Director of Assessment 173

s.25(1)
Clay v. Director of Assessment 35

s.25(3)(f)
Van Tassell v. Director of Assessment 139

s.25(b)(1)
Lebanese Association of Nova Scotia v. Director of Assessment 19

s.38
Ali v. Director of Assessment 255
Atlantic Wholesales Ltd. v. Director of Assessment 61
Conrad v. Director of Assessment 235
Director of Assessment v. J. Duncan C. Motels Ltd. 45
Director of Assessment v. Lord Nelson Hotel Ltd. 173
Eaton's Ltd. v. Director of Assessment 267
Hume v. Director of Assessment 159
Lebanese Association of Nova Scotia v. Director of Assessment 19
Lord Nelson Hotel Ltd. v. Director of Assessment 173

s.40(a)(6)
Van Tassell v. Director of Assessment 139

s.40(b)(1)
Ballou v. Director of Assessment 373
Clay v. Director of Assessment 35
Van Tassell v. Director of Assessment 139

s.40(b)(3)
Clay v. Director of Assessment 35

s.40(b)(6)
Ballou v. Director of Assessment 373
Van Tassell v. Director of Assessment 139

s.40(b)(7)
Van Tassell v. Director of Assessment 139

s.40(b)(11)
Ballou v. Director of Assessment 373

s.65(2)
McKay v. Director of Assessment 307

s.71(1)
Atlantic Wholesalers Ltd. v. Director of Assessment 61

s.72(2)
Hume v. Director of Assessment 159

s.77
Ballou v. Director of Assessment 373
Director of Assessment v. A.W. Peters Enterprises Ltd. 91

s.77(1)
McKay v. Director of Assessment 307

s.77(2)
Clay v. Director of Assessment 35
Hume v. Director of Assessment 159

s.78
Ballou v. Director of Assessment 373
McKay v. Director of Assessment 307

s.84
Director of Assessment v. A.W. Peters Ltd. 91
Director of Assessment v. Lord Nelson Hotel Ltd. 173
Lord Nelson Hotel Ltd. v. Director of Assessment 173

s.89(1)
Director of Assessment v. A.W. Peters Enterprises Ltd. 91
Eaton's Ltd. v. Director of Assessment 267
Leribest Holdings Ltd. v. Director of Assessment 1
McKay v. Director of Assessment 307

s.90
Knickle v. Director of Assessment 215

s.91(1)
Director of Assessment v. A.W. Peters Enterprises Ltd........ 91
McKay v. Director of Assessment 307

s.98, 98(1)
McKay v. Director of Assessment 307

s.99
Ballou v. Director of Assessment 373
Clay v. Director of Assessment 35
Director of Assessment v. A.W. Peters Enterprises Ltd. 91
Lebanese Association of Nova Scotia v. Director of Assessment 19
McKay v. Director of Assessment 307

s.100(1)
Ali v. Director of Assessment 255
Diab v. Director of Assessment 13
Knickle v. Director of Assessment 215

s.100(4)
Director of Assessment v. Lord Nelson Hotel Ltd. 173
Lord Nelson Hotel Ltd. v. Director of Assessment 173

s.101(1)
Ballou v. Director of Assessment 373
Director of Assessment v. A.W. Peters Enterprises Ltd. 91; 327
Director of Assessment v. J. Duncan C. Motels Ltd. 45
Lebanese Association of Nova Scotia v. Director of Assessment 19
McKay v. Director of Assessment 307

s.101(2)
Director of Assessment v. A.W. Peters Enterprises Ltd. 91
McKay v. Director of Assessment 307

s.108(1)
Clay v. Director of Assessment 35
Director of Assessment v. Lord Nelson Hotel Ltd. 173
Lord Nelson Hotel Ltd. v. Director of Assessment 173

s.142(1)
Director of Assessment v. Lord Nelson Hotel Ltd. 173
Lord Nelson Hotel Ltd. v. Director of Assessment 173

s.188(1)
Knickle v. Director of Assessment 215

s.190
Diab v. Director of Assessment 13

INTERPRETATION ACT R.S.N.S. 1967, c.151

s.6;7
Van Tassell v. Director of Assessment 139

s.6(1)(2)
Knickle v. Director of Assessment 215

MUNICIPAL BOARD ACT S.N.S. 1981, c.9

s.4(a)(b)
  Director of Assessment v. A.W. Peters Enterprises Ltd. 91

s.4(b)
  McKay v. Director of Assessment 307

s.22(1)
  Van Tassell v. Director of Assessment 139

s.27
  Leribest Holdings Ltd. v. Director of Assessment 1

s.27(1)
  Director of Assessment v. Lord Nelson Hotel Ltd. 173
  Lord Nelson Hotel Ltd. v. Director of Assessment 173

s.27(2)
  Diab v. Director of Assessment 13

s.32;32(2);34;35(1);45
  Director of Assessment v. A.W. Peters Enterprises Ltd. 91

s.50(1)
  Leribest Holdings Ltd. v. Director of Assessment 1

B.N.A. Act

s.96
  Director of Assessment v. A.W. Peters Enterprises Ltd. 91

ASSESSMENT

SUBJECT TABLE

Assessment - Business Occupancy - shopping Centre tenants - square root method - rental apportionment method - which preferable.
Atlantic Wholesalers Limited v. Director of Assessment........... 61

Assessment - Business Occupancy - tenant in shopping centre - new information on leased area and rent.
Hudson Bay Company v. Director of Assessment. 85

Assessment - Business Occupancy - department store in shopping centre - valuation - whether mall, common areas and parking areas to be included - income method - capitalization rate.
Eaton's Ltd. v. Director of Assessment 267

Assessment - Change in Use - factors to consider - whether vendor or purchaser responsible - factors to consider - valuation.
Van Tassell v. Director of Assessment 139

Assessment - Change in Use - forest property - jurisdiction - whether can hear appeal of Regional Assessment Appeal Court decision on jurisdiction - whether hearing would be "de novo" - non-residents allowing trees to grow wild.
Ballou v. Director of Assessment 373

Assessment - Classification - valuation - resource property - exemption as forest property - jurisdiction of Board.
Clay v. Director of Assessment 35

Assessment - Commercial - shopping centre - cost approach - income approach - effect on tenants business occupancy by changing method of calculating owners commercial assessment.
Leribest Holdings Ltd. v. Director of Assessment 1

Assessment - Commercial - bowling lanes - assessable property - jurisdiction of the Board.
A.W. Peters Enterprises Ltd. v. Director of Assessment 91

Assessment - Commercial - bulk freezer units - machinery and equipment tax rebate program - whether should be assessed as machinery, equipment, etc., or as building or structure.
Director of Assessment v. Oxford Frozen Foods Ltd. 113

Assessment - Commercial - business occupancy - bowling lanes - whether assessable property - whether buildings - whether structure - whether estopped by Provincial Tax Commission decision that constituted tangible personal property.
Director of Assessment v. A.W. Peters Enterprises Ltd.......... 327

Assessment - Exemption - non-profit cultural organization - evidence of House of Assembly debates inadmissable.
Lebanese Association of Nova Scotia v. Director of Assessment 19

Assessment - Jurisdiction - Notice of Appeal - service in accordance with statute.
Diab v. Director of Assessment 13

Assessment - Jurisdiction - residential - failure to serve clerk of the municipality with Notice of Appeal - failure of recorder to serve appellant by registered mail.
Knickle v. Director of Assessment 215

Assessment - Jurisdiction - whether power to review Assessment Appeal Court Decision declining jurisdiction.
McKay v. Director of Assessment 307

Assessment - Residential - market value - assessment relative to neighbour's assessment considered.
Hume v. Director of Assessment 159

Assessment - Residential - market value - cost approach - market approach
DeMille v. Director of Assessment 225

Assessment - Residential - valuation - market value - recent sales comparison - cost approach - Nova Scotia Residential Assessment Manual.
Conrad v. Director of Assessment 235

Assessment - Residential - valuation - market value - market data or direct sales approach - cost approach - use of comparables where many differences requiring adjustment - factors not considered by assessor.
Day v. Director of Assessment 357

Assessment - Residential and Commercial - business occupancy - 32 unit motel - cost, income and comparative sales approaches - agreement by parties
Director of Assessment v. J. Duncan C. Motels Ltd. 45

Assessment - Residential and Commercial - jurisdiction - company's failure to supply information - hotel complex- whether part residential - whether lounge and beverage room part of hotel complex or adjacent commercial complex - whether income from parking areas part of hotel income - valuation of furniture, fixtures and equipment
Director of Assessment v. Lord Nelson Hotel Ltd. 173
Lord Nelson Hotel Ltd. v. Director of Assessment 173

Assessment - Residential and Commercial - market value - inadequate inspection - revised appraisal
Ali v. Director of Assessment 255

Re Leribest Holdings Ltd. and Town of Bridgewater

ASSESSMENT--COMMERCIAL--SHOPPING CENTRE--COST APPROACH--INCOME APPROACH--EFFECT ON TENANTS' BUSINESS OCCUPANCY BY CHANGING METHOD OF CALCULATING OWNERS COMMERCIAL ASSESSMENT--ASSESSMENT ACT, Ss. 7(2), 89--MUNICIPAL BOARD ACT, Ss. 27, 50(1)

This is an appeal from a decision of the Lunenburg Regional Assessment Appeal Court confirming the 1982 commercial assessment of the South Shore Mall in Bridgewater at $2,275,000.00. Certain tenants demonstrated they had a real and substantial interest and were allowed to participate. Prior to the hearing, the Director of Assessment and the Appellant agreed on the market value of the South Shore Mall for the 1982 assessment year as $2,085,400.00 and the tenants agreed with this. The original valuation was determined by the cost approach, and the revaluation by the income method.

HELD--The commercial assessment is reduced to $2,085,400.00. The business occupancy assessment of each tenant is correspondingly reduced using the square footage of each tenant to the total leasable space. There is no award of costs.

The Board has the power under s. 89 of the Assessment Act to alter the business occupancy assessments of the tenants. It is normally appropriate when a shopping centre is valued using the income approach to determine business occupancy on a rental rather than square footage basis. If this were done here, all tenants except Metropolitan Stores would have their assessments raised, while Metropolitan Stores would have its assessment reduced by the total amount all the other tenants' assessments went up. All tenants in the Mall had accepted their 1982 assessments without appeal. It is not appropriate in the case of an appeal by an owner from the commercial assessment of his property to substantially alter the business occupancy assessments of all the tenants by changing the method by which they were assessed after the business occupancy assessments of all the tenants had been finalized pursuant to the appeal provisions of the Assessment Act. However, it is appropriate to reduce the business occupancy assessments of all tenants as a result of the reduction in the assessed value of the Mall. This is done on the basis of the number of square feet occupied by each tenant to the total leaseable space using the market value of the Mall as determined by the Board using the income approach.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by LERIBEST HOLDINGS LIMITED from the decision of the Lunenburg Regional Assessment Appeal Court respecting its commercial property in the Town of Bridgewater.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, Vice-Chairman
DARRYL W. WILSON, C.A., LL.B, Member.

COUNSEL: NICHOLAS PITTAS, LL.B for the Appellant;

MARIAN F.H. TYSON, LL.B for the Director of Assessment;

K.J. KENNEY, Q.C., for the Town of Bridgewater;

MARIE MacDONALD, on behalf of the South Shore Mall Merchants Association, without counsel;

JIM STEVENSON, on behalf of Atlantic Wholesalers, without counsel.

DECISION

This is an appeal by LERIBEST HOLDINGS LIMITED from a decision of the Lunenburg Regional Assessment Appeal Court dated April 15, 1982, whereby that Court confirmed the 1982 commercial assessment of the South Shore Mall in the Town of Bridgewater at $2,275,000.00. This appeal was originally filed with the County Court for District Number Two but was not set down for a hearing by that Court as of September 1, 1982. The Municipal Board Act, c. 9, Statutes of Nova Scotia 1981, came into force on June 1, 1982. Section 50(1) of that Act reads as follows:

> "50(1) Upon the coming into force of this Act, any matter pending before the Provincial Planning Appeal Board, the Board of Commissioners of Public Utilities pursuant to the Municipal Boundaries and Representation Act or a county court pursuant to Sections 99 and 100 of the Assessment Act shall, if not set down for a hearing to commence within ninety days of the coming into force of this Act, be transferred to the Nova Scotia Municipal Board for hearing and determination, but otherwise shall be heard and determined by the board or court that would have had jurisdiction but for this Act."

As a result, this appeal was transferred to the Nova Scotia Municipal Board for hearing and determination. The hearing of the appeal took place on June 8, 1983, in the offices of the Expropriations Compensation Board in the City of Halifax with the consent of all parties.

Although the present appeal relates to the valuation of the South Shore Mall, representatives of certain tenants in the Mall demonstrated to the Board that the tenants had a real and substantial interest in the subject matter of the hearing and pursuant to Section 27 of the Municipal Board Act were allowed to participate in the hearing by the Board. The tenants were concerned about alterations to their 1982 business occupancy assessments as a result of changes in the commercial assessment of the Mall.

At the conclusion of the hearing, representatives of the tenants indicated that they had appealed their 1983 business occupancy assessment and requested that the Board not make a decision with respect to the proper method to determine business occupancy assessment in this appeal until the Board heard the appeal by the tenants of their 1983 assessments. The solicitor for the Director of Assessment agreed to this request.

At the beginning of the hearing, the Board was advised that the Director of Assessment and the Appellant were in agreement on the value to recommend to the Board with respect to the market value of the South Shore Mall for the 1982 assessment year. The representatives of the Mall tenants also indicated their agreement with the proposed new valuation and reiterated that their concern was only with a proposed alteration in the method of calculating their 1982 business occupancy assessments as a result of the change in the assessed value of the Mall.

Mr. John C. MacKay, Assistant Provincial Director of Assessment, gave evidence on behalf of the Director of Assessment. His appraisal report was filed with the Board as Exhibit B-4. In Mr. MacKay's opinion, the correct value for the South Shore Mall for assessment purposes for the 1982 assessment year is $2,085,400.00.

According to Mr. MacKay, the initial 1982 assessment of $2,275,000.00 which was appealed to the Lunenburg Regional Assessment Appeal Court and confirmed by that Court was based on the cost approach to value. When the Appellant appealed the decision of the Regional Assessment Appeal Court to the County Court, Mr. MacKay was requested to value the subject property on behalf of the Director of Assessment. In determining his opinion of market value for assessment purposes, Mr. MacKay adopted the income method of valuation. In Mr. MacKay's opinion, the income method was a more appropriate method than the cost method to value the South Shore Mall. According to Mr. MacKay a shopping centre is an income producing property and its market value is determined on the basis of the income it generates. Mr. MacKay also said that by using the income method he was complying with a recent County Court assessment decision which approved the income method of valuation for shopping centres. As a result of his re-examination of the market value of the South Shore Mall using the income method, Mr. MacKay recommended that the market value of the South Shore Mall for assessment purposes be reduced from $2,275,000.00 to $2,085,400.00 for the 1982 assessment year.

Mr. MacKay stated that the income method involves estimating the annual net operating income for the property and then capitalizing that income at an appropriate rate to provide an indication of the property's market value.

Mr. MacKay calculated the net operating income for the South Shore Mall for the year ending December 31, 1981 as follows:

TOTAL ANNUAL GROSS ECONOMIC RENT	$ 318,742.00
MISCELLANEOUS AND RECOVERY INCOME	156,773.00
TOTAL ANNUAL GROSS INCOME	475,515.00
LESS VACANCY AND BAD DEBTS 5%	23,776.00
EFFECTIVE GROSS INCOME	451,739.00
LESS OPERATING EXPENSES	123,261.00
NET OPERATING INCOME	$ 328,500.00

In determining the gross economic rent, Mr. MacKay reviewed the various leaseable areas in the mall, the actual rents being paid for leased space and the rents being requested by the landlord for vacant space in the Mall. He then assigned an economic rent per square foot for each rental area in the Mall. Mr. MacKay determined the gross economic rent per year for each rentable space by multiplying the economic rent per square foot for each rentable space by its gross leasable area. The total gross economic rent of all leasable space in the Mall determined by Mr. MacKay was $318,742.00. According to Mr. MacKay, the miscellaneous and recovery income of $156,773.00 and the expense figure of $123,261.00 were the actual income and expenses reported by the owner of the mall for the year ending December 31, 1981. In setting an allowance for vacancy and credit loss, Mr. MacKay compared the estimated total annual gross income he expected the Mall to yield with its actual total annual gross income as well as reviewing the actual vacancy in the Mall for the 1981 year. He then concluded that 5% was a reasonable vacancy and bad debt allowance.

In determining an appropriate capitalization rate, Mr. MacKay compared the South Shore Mall to the Woodlawn Mall in the City of Dartmouth. The sale of the Woodlawn Mall indicated a capitalization rate of 12.5% based on economic rents. According to Mr. MacKay, this Mall had the same anchor tenants, the Metropolitan and Atlantic Wholesalers Save-Easy, as the South Shore Mall and both Malls were of a similar age. The Woodlawn Mall had a gross leasable area approximately 15,000 square feet larger than the South Shore Mall but it also had a 15% vacancy rate. Mr. MacKay determined that an appropriate capitalization rate for the subject Mall was 12%.

Since the taxes for the property whose assessment is under appeal were excluded from expenses in the calculation of net income by Mr. MacKay, the property taxes resulting from Mr. MacKay's appraisal of the subject property must be included in the final determination of value. Mr. MacKay did this by adding an effective tax rate of 1.96 to the capitalization rate of 12% so as to include the correct property taxes in the final determination of value.

By dividing the net annual income of the property ($328,500.00) by the capitalization rate adjusted for taxes (13.96%) and multiplying by 100, Mr. MacKay arrived at a market value for the South Shore Mall of $2,353,151.00 which he rounded to $2,353,100.00.

Mr. MacKay stated that in 1981, in the Town of Bridgewater, property was assessed at 86% of its market value. In order that the assessment of the South Shore Mall be uniform with other property assessments in the Town of Bridgewater, Mr. MacKay calculated the market value of the subject Mall for assessment purposes to be $2,023,600.00 (86% of $2,353,100.00).

Mr. MacKay stated that the site on which the shopping centre was located contained land in excess of the needs of the shopping centre. The total area of the site is 21.62 acres with 9.26 acres associated with the shopping centre and 12.36 acres being excess land. Mr. MacKay valued the excess land separately from the shopping centre. According to Mr. MacKay the market value of acreage land in the Town of Bridgewater as of January 1, 1980, was $5,000.00 per acre. Mr. MacKay determined the value of the excess land to be $61,800.00 (12.36 acrea of $5,000.00 per acre).

Mr. MacKay's final estimate of market value for assessment purposes of the Appellant's property is $2,085,400.00

comprised of $2,023,600.00 for the shopping centre and $61,800.00 for the excess land.

The Appellant, the tenants represented at the hearing and the Town of Bridgewater all agreed with Mr. MacKay's final estimate of value.

Having considered the evidence of Mr. MacKay and the agreement of the Appellant and all interested persons with Mr. MacKay's evidence, the Board determines the commercial assessment of the Appellant's property to be $2,085,400.00.

As a result of recommending a reduction in the market value of the South Shore Mall for assessment purposes, Mr. MacKay also recommended adjusting the business occupancy assessments of the Mall tenants. Initially, the tenants' business occupancy assessments were calculated on the basis of the number of square feet occupied. Mr. MacKay said that the square foot method of determining business occupancy assessment was used initially because the shopping mall was valued on the cost approach and the square foot method of apportioning business occupancy assessment was appropriate when using the cost approach.

When Mr. MacKay valued the shopping mall on the income approach in preparation for the appeal before the Board he changed the method of determining business occupancy assessments. In Mr. MacKay's opinion, he was bound by the County Court decision in the case of Zeller's Limited v. The Town of New Glasgow and the Director of Assessment, 1981, C.P. 07860, where Judge Lusby decided that when a shopping centre is valued on the basis of the income method, the business occupancy assessment for each tenant should be calculated on the basis of the rent paid rather than the number of square feet occupied.

The result of Mr. MacKay's changed method of determining business occupancy assessment is that every tenant in the shopping centre with the exception of the Metropolitan Store would have its 1982 business occupancy assessment increased even though Mr. MacKay was recommending a reduction in the market value of the shopping centre. The Metropolitan Store's business occupancy assessment would be reduced by $216,100.00 which equals the total increase in business occupancy assessments of all other tenants in the mall.

Appearing at the hearing in opposition to the proposed change in method of determining the 1982 business occupancy assessments were Marie MacDonald, on behalf of the South Shore Mall Merchants Association and Mr. Jim Stevenson, on behalf of Atlantic Wholesalers, a tenant in the Mall. Mrs. MacDonald, Mr. Stevenson and Mr. Harold Gleekman (a tenant represented by Mrs. MacDonald) gave evidence at the hearing. Subsequent to the hearing Mrs. MacDonald submitted a written brief on behalf of the South Shore Mall Merchants Association and Mr. John Merrick, Q.C., although not appearing as counsel at the hearing, submitted a written brief on behalf of Atlantic Wholesalers Limited. The Board has considered the evidence and the written briefs of the above persons as well as the evidence of Mr. MacKay and the written submission of the Solicitor for the Director of Assessment in reaching its decision.

The Director of Assessment, having initially assessed the tenants of the South Shore Mall on the basis of the number of square feet occupied now wishes to assess them on the basis of the rent they pay notwithstanding that all tenants in the mall accepted their 1982 business occupancy assessment as notified by the Director of Assessment.

While the economic rent method of allocating business occupancy assessment is a valid approach to use in proper cases, in the opinion of the Board, it is not appropriate in the case of an appeal by an owner from the commercial assessment of his property to substantially alter, under the Board's discretionary power pursuant to Section 89, the business occupancy assessments of all the tenants by changing the method by which they were assessed after the business occupancy assessments of all the tenants had been finalized pursuant to the appeal provisions of the Assessment Act.

However, the Board is of the opinion that it is appropriate to reduce the business occupancy assessments of all tenants in the South Shore Mall for the 1982 assessment year as a result of the reduction in the assessed value of the South Shore Mall. The Board determines that the business occupancy assessment for 1982 for each tenant in the South Shore Mall should be adjusted on the basis of the number of square feet occupied by each tenant over the total square footage of leaseable space in the Mall using the market value of the South Shore Mall as determined by the Board and the appropriate per centum for each tenant pursuant to Section 7(2) of the Assessment Act.

There will be no award as to costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 13th day of January, A.D., 1984.

R.H. BLOIS, Q.C.

ELIZABETH LAWRENCE

DARRYL W. WILSON

Re Diab and City of Dartmouth

ASSESSMENT--BUSINESS OCCUPANCY--JURISDICTION--NOTICE OF APPEAL--SERVICE IN ACCORDANCE WITH STATUTE--ASSESSMENT ACT, Ss. 100(1), 190

This is an appeal from a decision of the Regional Assessment Appeal Court, Dartmouth Region confirming the business occupancy assessment at $15,800.00 for Chidiac Grocery on Pleasant Street. The Director of Assessment proved by affidavits that the Appellant had not served the Director, the Regional Director of Assessment, the Recorder of the Appeal Court, or the City Clerk with notice of her appeal. She admitted serving the Board only.

HELD--The appeal is dismissed without costs.

The failure of the Appellant to meet the statutory obligation created by s. 100(1) of the Assessment Act to serve the Notice of Appeal on the persons specified results in the Board being unable to assume jurisdiction to hear her appeal on the merits.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An appeal by EVELYN DIAB from the decision of the Dartmouth Regional Assessment Appeal Court dated April 12, 1983, which confirmed the business occupancy assessment of the Chidiac Grocery, 228 Pleasant Street, in the City of Dartmouth

BEFORE: ELIZABETH LAWRENCE, Vice-Chairman

COUNSEL: EVELYN DIAB appeared on her own behalf without counsel

MARIAN F.H. TYSON, LL.B., for the Director of Assessment

DECISION

The hearing of this appeal, on the issue of jurisdiction only, took place at the offices of the Municipal Board, Suite 510, 1809 Barrington Street, Halifax, on February 7, 1984.

The decision of the Regional Assessment Appeal Court, Dartmouth Region, dated April 12, 1983, and signed by the Vice-Chairman, Benjamin Blufarb, states that the Appellant failed to appear at the hearing of that Court. Satisfied that the Appellant had received proper notice of the time, place and date of the hearing, the Regional Assessment Appeal Court heard evidence from the Assessor and confirmed the business occupancy assessment of $15,800.00 for the property of the Appellant at 228 Pleasant Street, Dartmouth, N.S.

The Appellant filed an appeal with the Board from that decision dated April 22, 1983, which was received by the Board April 27, 1983.

Counsel for the Director of Assessment gave notice to the Appellant by letter dated June 2, 1983, that she would object to the Board assuming jurisdiction to hear the appeal because the Appellant had failed to serve a Notice of Appeal on either the Director of Assessment or the Regional Director of Assessment, as well as on the Recorder of the Regional Assessment Appeal Court and on the Clerk of the City of Dartmouth as required by Section 100(1) of the Assessment Act.

Counsel further submitted to the Board on June 6, 1983, Affidavits from the Director of Assessment, the Regional Director of Assessment, the Recorder and the City Clerk stating that they had not been served with a Notice of Appeal by the Appellant. These Affidavits were accompanied by an Affidavit of Service by Donald Horne, Regional Director of Assessment for Dartmouth, stating that on June 6, 1983, he had personally served the Appellant with copies of the aforementioned Affidavits.

The Board set down Monday, February 20, 1984, as a date for a hearing on jurisdiction only. A Notice of Hearing was personally served on the Appellant on January 20, 1984. The Appellant contacted the Board on the same day to say that she would be unable to attend a hearing on that date because of scheduled surgery. With the agreement of counsel for the Director, an alternative date for the hearing was set down and a revised Notice of Hearing was sent to all parties pursuant to Section 27(2) of the Municipal Board Act.

At the commencement of the hearing, Counsel for the Director reviewed the Affidavits previously submitted to the Board in relation to Section 100(1) of the Assessment Act which states:

> "Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise."

Further, on the issue of service of Notice of Appeal, Section 190 of the Assessment Act states:

> "Any notice required by this Act to be served on the Director shall be sufficiently served if served on a regional director of assessment or delivered to an assessment office maintained by the Director."

Counsel for the Director argued that the Affidavits submitted by her proved that neither the Director of Assessment, the Regional Director of Assessment, the Recorder nor the City Clerk had been served with a Notice of Appeal by the Appellant as required by Section 100(1) of the Assessment Act and that the Board had therefore no jurisdiction to hear the Appeal.

The Appellant, whose native tongue is not English, acknowledged that she had filed her appeal with the Board only.

The Board is satisfied from the sworn Affidavits and from the evidence of the Appellant that the statutory obligation of the Appellant to serve the Notice of Appeal on the Director or Regional Director of Assessment, the Recorder and the City Clerk was not complied with. This failure of the Appellant to comply with the requirements of Section 100(1) of the Assessment Act results in the Board being unable to assume jurisdiction to hear her appeal on the merits.

The Board therefore, for the reasons stated, dismisses this appeal without costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 9th day of February, A.D., 1984.

E Lawrence

ELIZABETH LAWRENCE

Re Lebanese Association of Nova Scotia and City of Halifax

ASSESSMENT--EXEMPTION--NON-PROFIT CULTURAL ORGANIZATION--EVIDENCE OF HOUSE OF ASSEMBLY DEBATES INADMISSIBLE--ASSESSMENT ACT, Ss. 7(2), 25B(1), 99

This is an appeal from the decision of the Regional Assessment Appeal Court, Halifax City Assessment Region deciding the Appellant is not exempt from business occupancy assessment in respect of premises at 6245-49 Quinpool Road. The sole issue is whether the Appellant should be exempt from business occupancy assessment under s. 25B(1) of the Assessment Act.

HELD--The appeal is allowed. The Appellant is a non-profit organization whose primary purpose is cultural. Therefore it "shall not be assessed for a business occupancy assessment". The Appellant is entitled to its costs on a party and party basis on the County Court scale.

The Appellant is incorporated under the Societies Act. Its Memorandum of Association and By-Laws express non-profit objects of a cultural nature. Evidence was given as to its activities and financial statements. While submissions were made concerning the admissibility of debates of the House of Assembly on the interpretation of s. 25B(1), these are not admissible. To qualify for the exemption an organization or institution must be non-profit and must also have as its primary purpose one of those enumerated in s. 25B.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act,
Chapter 14, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by the Lebanese
Association of Nova Scotia from the decision
of the Regional Assessment Appeal Court
Halifax City Assessment Region dated
March 15, 1983.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, VICE-CHAIRMAN
DARRYL W. WILSON, C.A., LL.B, MEMBER.

COUNSEL: ROBIN N. CALDER, LL.B, for the
Appellant,

MARIAN F.H. TYSON, LL.B, for the
Director of Assessment.

DECISION

This is an appeal under Section 99 of the Assessment Act, Chapter 14, R.S.N.S. 1967, by the Lebanese Association of Nova Scotia hereinafter referred to as the "Appellant", a society incorporated under the Societies Act, Ch. 286, R.S.N.S. 1967 as amended. The Appellant appealed the decision of the Regional Assessment Appeal Court Halifax City Assessment Region dated March 15, 1983, which decided that the Appellant is not exempt from business occupancy assessment under the provisions of Subsection (1) of Section 25B of the Assessment Act, Ch. 14, R.S.N.S. 1967 as amended, with respect to premises occupied by the Appellant and located at 6245-49 Quinpool Road in the City of Halifax. Subsection (1) of Section 25B reads as follows:

> "Persons occupying property for the purposes of any non-profit community, charitable, fraternal, educational, recreational, religious, cultural or sporting organization or institution shall not be assessed for a business occupancy assessment."

The hearing of the appeal took place on June 7, 1983, and briefs were subsequently filed on behalf of the Appellant and the Director of Assessment.

The sole issue is whether or not the Appellant should be assessed for business occupancy assessment with respect to its occupancy of property situate at 6245-49 Quinpool Road in the City of Halifax.

Evidence on behalf of the Appellant Society was given by Peter Habib its Secretary-Treasurer and on behalf of the Director of Assessment by Barrie Woodworth an assessor employed by the Province of Nova Scotia.

Mr. Habib who was born in Lebanon is a Canadian Citizen and resides at 2050 Elm Street in the City of Halifax. He is the Secretary-Treasurer of the Lebanese Association of Nova Scotia and has been a resident of Halifax for twenty-five years. He stated that there are approximately 6,000 - 7,000 persons of Lebanese origin in Halifax and 10,000 in Nova Scotia. The Appellant association was formed in 1981 under the provisions of the Societies Act. Prior to 1981 the name of the Association was Metropolitan Lebanese Association. Mr. Habib collects monies received at various functions conducted by the Appellant as well as club dues and he also pays the expenses. He is a member of the Executive of the Association.

There are approximately 120 members of the Association, and to be eligible for membership one must be Lebanese (that is a person of Lebanese descent) or married to a Lebanese person.

A copy of the Memorandum of Association of Metropolitan Lebanese Association dated May 11, 1981, was filed as Exhibit L-6. The name of the Association was subsequently changed to Lebanese Association of Nova Scotia on January 29, 1982. Clause 2 of the Memorandum of Association (hereinafter called the Memorandum) sets forth the objects of the Society in sub-clauses (a) to (k) inclusive. Sub-clause (a) reads as follows:

> "To rise above personal, family, clannish, regional, political, and religious rivalries and to promote understanding, cooperation, and love among all Lebanese in Nova Scotia and in Canada."

Some of the other objects are:

> "(b) To foster among its members an unequivocal dedication and commitment to promoting, above personal interests, the common good and well-being of Nova Scotia's Lebanese community;
>
> (c) To strengthen the allegiance of all Lebanese and Lebanese Canadians who live in Nova Scotia to Canada and its Constitution;
>
> (d) To preserve and enhance their love for their country of origin, Lebanon, and to strengthen their ties to it;
>
> (e) To preserve, develop and promote the Lebanese culture among their children and their fellow Canadians."

Clause 3 of the Memorandum states that:

> "The Society is constituted for exclusively charitable purposes."

Clause 4 of the Memorandum states that:

> "The activities of the Society shall be carried on without the purpose of gain

> for its members and any profits or other accretions to the society shall be used in promoting its objects."

Clause 6 of the Memorandum states that:

> "Upon the dissolution of the Society and after the payment of all debts and liabilities, its remaining property shall be distributed or disposed of to charitable organizations which carry on their work solely in Canada."

Clause 7 states that:

> "The activities of the Society are to be carried on generally in the City of Halifax, the City of Dartmouth, and the County of Halifax, adjacent thereto, and such other places as the members consider conducive to the attainment of its objectives."

The Association's By-laws filed as part of Exhibit L-6 state in clause 3 that:

> "Subject to these by-laws every Lebanese/Lebanese Canadian, male or female, over the age of eighteen (18), and residing permanently in the Province of Nova Scotia, shall be eligible for membership in the Society; the non-Lebanese husband or wife of any Lebanese/Lebanese Canadian, and their children over the age of eighteen (18) shall also be eligible for membership in the Society."

Membership dues are $50.00 yearly for members and $10.00 for students. (Clause 4 of the By-laws).

Mr. Habib listed some of the Appellant's activities as follows:

1. it enters a float in the Natal Day parade each year;

2. it arranges for a celebration of the Independance Day of Lebanon each year. The public may attend this celebration held in the Appellant's club rooms. Films are shown on this occasion and refreshments are served. About 600 persons attend;

3. it conducts a weekly one-hour program on the Community T.V. Channel at no charge

to the Appellant;

4. it arranges for children's parties and picnics.

The Appellant receives income representing a percentage of revenue from bingo operated by T.C.A., a commercial operation. A copy of the Appellant's Statement of Receipts and Expenses for the year ended April 15, 1982 was filed as Exhibit L-4. This statement shows total receipts of $36,258.56 and total expenses of $36,965.26 for a deficit of $706.70. The balance sheet as of April 15, 1982, shows total assets of $5,493.30 comprising funds in the bank and cash on hand of $481.30; furniture of $1,012.00 and equipment of $4,000.00 and liabilities comprising loans payable of $6,200.00 and a deficit of $706.70.

The Appellant rents its premises at 6245-49 Quinpool Road, Halifax, in order to cater to its members and to the Lebanese Community. The occupied premises were formerly used as a disco establishment with a dance floor and bar. The bar is now used to serve coffee and sandwiches. Liquor is not served except on special occasions when a banquet licence is obtained. Members of the Appellant Association do not receive any remuneration for their services on behalf of the Lebanese Association.

The Appellant on one occasion held a fashion show and raised the sum of $495.00. Publications printed in Lebanon are available at the Association's premises.

On dissolution of the Appellant society all assets after the payment of all liabilities are to be distributed to charitable organizations in Canada.

On cross-examination Mr. Habib agreed that members of the Association need not be Lebanese. He also stated that there are no associate members.

The Appellant's premises are occasionally rented for non-society purposes at a flat.fee of $75.00.

Evidence for the Director was given by Mr. Barrie D. Woodworth who is employed by the Province of Nova Scotia as a senior assessor for Halifax City. He has been employed as an assessor in the City since 1963 and prior to the Province taking over the assessment field was employed by the City of Halifax. He has attended the annual school for assessors every year but one. He is responsible for co-ordinating the daily routine of junior assessors. He is responsible for the more difficult assessment problems in the City. The Board accepted Mr. Woodworth as an expert in assessment matters.

Mr. Woodworth's evidence is that he assessed the Appellant for business occupancy assessment for the year 1983 after having personally inspected the Appellant's premises. He indicated that the premises resembled a lounge with dance floor and bar and was formerly used as such. He then made the assumption that the Appellant's occupation of the premises was profit motivated and accordingly assessed it for business occupancy tax assessment.

At the hearing before the Board Mr. Woodworth stated that he now believes the Appellant is a non-profit cultural organization but in his understanding, for an organization to be exempt from business occupation assessment under Section 25B(1) of the Assessment Act, Ch. 14, R.S.N.S., it has to be "community" oriented and in this regard he was of the opinion that the Appellant did not qualify.

Mr. Woodworth is the author of a report filed with the Board as Exhibit L-3. In his report Mr. Woodworth sets forth the text of Sections 7 - 10 inclusive as well as Section 25B(1) and Section 38(1) of the Assessment Act.

Although the market value for assessment purposes of the subject property located at No. 6245-49 Quinpool Road was not at issue, the report indicated that this value was the amount of $272,300.00 as of January 1, 1980. The business occupancy assessment for the Appellant was computed by multiplying the area occupied (3,800 square feet) by an economic rent (determined to be $5.00 a square foot), by a factor of 6.29 representing the per cent of gross income to assessed value and by 50% being the percentage set forth in Section 7(2) of the Assessment Act. The actual figures used by Mr. Woodworth to arrive at the business occupancy assessment are $3,800 x $5.00 x 6.29 x 50 = $59,755.00 rounded to $59,700.00.

Mr. Woodworth seemed to be hard pressed to state unequivocally the test to determine whether or not an organization is exempt from business occupancy under Section 25B(1) of the Assessment Act. He appeared to think that membership in the organization must be completely open to anyone in the community and the organization must be a non-profit one which benefits the community at large and must occupy property for one or more of the purposes set forth in Section 25B(1) namely "charitable, fraternal, educational, recreational, religious, cultural or sporting...".

During his oral argument the Appellant's solicitor stated that he intended to attach to his written submission to the board a copy of some extracts from the debates of the House of Assembly which took place at the time of the introduction of an amendment to the Assessment Act incorporating what is now Section 25B(1). Counsel for the Director expressed the opinion that these debates were inadmissible in the Courts and should be inadmissible in this instance.

The Board reserved its opinion on the admissibility of the extracts from the House of Assembly Debates and requested counsel to file briefs on this question. The Board by letter dated June 24, 1983, addressed to both counsel stated that the Board decided not to permit the introduction of the debates in evidence.

Counsel for the Appellant in his submission to the Board argues that "there is a general tendency to free administrative boards from the rules of evidence that prevail in civil and criminal courts" and the Board agrees with this broad statement. He then quotes from a text on administrative law, 2nd ed. by Professor David Mullan of Queens University that "In more general terms the strict rules of evidence seldom if ever, apply at common law to statutory decision makers obliged to hold hearings... Moreover, even though not bound by the strict rules of evidence, a tribunal is not relieved from the responsibility of acting only on evidence which has cogency at law". He also quotes from Professor Mullan's text in paragraph 82 as follows:

> "Decision makers are given wide powers with respect to the reception of evidence. Subject to certain exceptions the decision maker may admit his evidence irrespective of oath or affirmation or admissibility in a court of law, any oral testimony or any document or other thing relevent to the proceedings and is free to act upon such evidence. There are two limitations to

> this. Anything not admissible in a court of law by reason of privilege is inadmissible by a decision maker. Also, statutory limitations on the admissibility of evidence are applicable to the Act including provisions and other statutes limiting the extent to which and the purposes for which evidence may be used."

Counsel for the Appellant also quotes Robert F. Reid, Q.C. from his text entitled "Administrative Law and Practice" at page 73 as follows:

> "A tribunal freed by statute from the technical rules of evidence may permit kinds of proof that would not likely be allowed in court."

Counsel for the Appellant refers to the Board's duties in assessment appeals set forth in Section 101(1) of the Assessment Act, R.S.N.S. 1967, Ch. 14 as follows:

> "The Nova Scotia Municipal Board shall inquire into the matter de novo and shall examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter."

He then points out that the Board has the powers, privileges and immunities of a commissioner appointed under the Public Inquiries Act, R.S.N.S. 1967, c. 250, and he quotes Section 3 of that Act which gives a commissioner the power of summoning witnesses and requiring them to give evidence and produce such documents as "the commissioner or commissioners deem requisite to a full investigation of the matters into which he or they are appointed to inquire."

Counsel for the Appellant argues that he cannot find any statutory limitation on the evidence the Board may hear "providing that evidence is relevant to the matter at hand and could not be excluded by reason of the evidence being a matter of privilege". He then argues that "in determining therefore the intent of the Legislature under Section 25B(1), the Municipal Board is not restricted in the same way that a Court of law may be restricted in the admission of evidence, and whether or not the legislative debates are admissible in a court of law is not relevent". He concludes by submitting that the Legislative Debates and in particular the speeches of the Honourable Minister of Municipal Affairs" when introducing the amendment now known as Section 25B(1) are relevent and are admissible and should be part of the evidence under consideration by the Board".

Counsel for the Director in her brief on the admissibility of the Hansard Debates argues that the general rule is that debates are not admissible in aid of the interpretation of statutes and she cites the case of A.G. of Canada v. Reader's Digest Association (Canada) Ltd. [1961] S.C.R. 775 where the Supreme Court of Canada decided that the budget speech of the Minister of Finance relating to the purpose behind the imposition of a tax on magazines printed by a Canadian subsidiary of a foreign publishing company was inadmissible. She quotes Cartwright J. in the Readers Digest case at pages 792 - 93 as follows:

> "In the case at bar it will be open to the parties to lead evidence to show the circumstances to which the impugned sections are to be applied but it must be evidence in a form that is legally admissible and the statement of the Minister alledged to have been made, is not in my opinion legally admissible.
>
> As was said by Viscount Sumner in delivering the judgment of the Judicial Committee in Attorney General for Manitoba v. Attorney General for Canada, [1929] A.C. 260 at 268:
>
> 'The matter (i.e. the question of the validity

> of the statute) depends upon the effect of the legislation not upon its purpose.'
>
> ...Parliament is an entity which from its nature cannot be said to have any motive or intention other than that which is given expression in its formal acts."

Counsel for the Director in her brief quotes from the judgment of Disbery J. in applying the Readers' Digest case in Central Canadian Potash Co. Ltd. v. A.G. of Saskatchewan [1975] 5 W.W.R. 193(Q.B.) at p. 214 as follows:

> "Neither the Premier nor any other Minister of the Crown has authority to speak for the members of the Legislature as to the intent and purpose of proposed legislation. It may be that some government members may oppose the Minister's Bill or some opposition members support it. The Bill may be amended, withdrawn or be defeated. Only when it has passed into law can the meaning and intent of the Legislature be found by reading what the Act says, subject, of course, to another and different intent and purpose being shown to be the true and real intent and purpose when 'intra vires v. ultra vires' is an issue. Again, in law, no Minister may speak for the Sovereign. Consequently such statements by the Premier, his Ministers or any other member of the Legislature is not relevant evidence to prove the fact of what the intent of the Legislature was as a collective body. Not being relevant such statements are inadmissible."

Counsel for the Director refers the Board to the decision of the New Brunswick Supreme Court, Appeal Division in New Brunswick Liquor Corporation v. Canadian Union of Public Employees Local 963 (1978), 21 N.B.R. (2d.) 441 which held that it was wrong, but not necessarily fatal, for a board to consider legislative debates in construing a statutory provision without giving the parties a chance to argue the effect and applicability of the debates. Limerick J. in that case made these observations at page 447, namely:

> "Counsel for the Board, addressing the Court

> on the matter of the Board's jurisdiction, admitted the Board improperly examined and referred to the discussions in the Legislature by members of the Legislature and the Minister of Labour, as reported in the Synoptic Reports, to determining the interpretation of the Act and did so without affording the opportunity to the Employer to comment on the proper interpretation of the speeches so reported. The Board thereby erred in two respects - (1) in denying natural justice to the applicant in that it was not given the opportunity to argue the effect of the debates and their applicability and (2) it considered extrinsic evidence which is not admissible in the courts of Canada, as an aid in interpreting a statute."

The Board is of the opinion that extracts from the Debates of the House of Assembly relating to the intent and purpose of the introduction of an amendment to the Assessment Act resulting in the legislature passing what is presently Section 25B(1) are not admissible. The Debates of the House of Assembly are not in law relevant evidence to prove the fact of what the intent of the legislature was at the time of the passing of the legislation and are therefore inadmissible. The case law indicates however that courts have admitted in evidence debates for the purposes of determining the constitutional construction of a statute as opposed to its characterization.

Referring now to the merits of the appeal the Board is of the opinion that from the evidence adduced the appellant occupies property as a tenant located at 6245 - 49 Quinpool Road in the City of Halifax for the purposes of a non-profit cultural organization within the meaning and intent of Section 25B(1) of the Assessment Act, R.S.N.S. 1967, ch. 14 and therefore "shall not be assessed for a business occupancy assessment" or in other words is exempt from business occupancy assessment.

Counsel for the Director admitted in argument that the Appellant was a cultural non-profit organization but was not a "community" organization therefore did not qualify for the exemption from business occupancy under the provisions of Section 25B(1).

The decision of the Regional Assessment Appeal Court under appeal after referring to the previous decisions in the Halifax Civic Workers Union and the Halifax Firefighters cases states in part that "one of the tests is that there must be some benefit to the community (the Municipal Taxpayers)." The Regional Court after referring to Mr. Habib's evidence "that membership is exclusive to those people who have some connection with the Lebanese Community" dismissed the appeal.

This Board in a decision dated December 21, 1983, relating to the appeal by the Trustees of the Halifax Civic Workers Union, Local 108, et al considered the meaning of Section 25B(1) of the Assessment Act and decided that it has jurisdiction to make a determination pursuant to this Section by virtue of the decision of Mr. Justice Nathanson of the Trial Division of the Nova Scotia Supreme Court in his decision relating to the application of the Trustees of Halifax Civic Workers Union Local 108 et al [1982, S.H. No. 38745].

In its decision in the case of the Trustees of the Halifax Civic Workers Union the Board stated at page 20 that "It is the Board's opinion that the word "non-profit" is an adjective qualifying each of the enumerated uses following, that is "community, charitable, fraternal, educational, recreational, religious, cultural or sporting." Therefore to qualify for the exemption from business occupancy assessment under Section 25B(1) an organization or institution must be first of all non-profit and must also have as its primary purpose one of the enumerated uses."

The Board finds from the evidence that the Appellant is a non-profit organization whose primary purpose is cultural, and determines that the Appellant meets the conditions set forth in Section 25B(1) of the Assessment Act and therefore "shall not be assessed for a business occupancy assessment" and allows the appeal.

The Board is of the further opinion that the Appellant should have its costs on its appeal to this Board to be taxed by Arthur E. Hare, Q.C., Barrister of Halifax on a party and party basis on the County Court scale.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 21st day of February, A.D., 1984.

RHBlois

R.H. BLOIS,

Lawrence

ELIZABETH LAWRENCE

DARRYL WILSON

Re Clay and Inverness County

ASSESSMENT--CLASSIFICATION--VALUATION--RESOURCE PROPERTY--EXEMPTION AS FOREST PROPERTY--JURISDICTION OF BOARD--ASSESSMENT ACT, Ss. 1(eb), 1(nb), 3(1)(d), 25(1), 40B(1), (3), 77, 99, 108(1)

This is an appeal from a decision of the Regional Assessment Appeal Court, Inverness-Victoria-Richmond Assessment Region confirming the 1983 assessment of the Appellant's property at Logan's Glen, Inverness County. The Appellant purchased the property, 136 acres of wooded and abandoned farmland, in 1980 when it was assessed as "forest resource exempt". In 1982 its designation was changed to "resource general". The Appellant appealed on the basis the property was "wrongly classified". He also was interested in contesting valuation.

HELD--The Board does not have jurisdiction to hear this appeal. The appeal is dismissed without costs.

Section 25 of the Assessment Act sets out the three classifications of property possible: "residential property, commercial property or resource property, or partly one and partly another". The subject property could be classified in no other way than as resource property. Whether the property should qualify for a partial exemption from taxation pursuant to s. 40B is a question of exemption from taxation and not of classification of property. A question of exemption is a question relating to the assessment which may only be determined by a Judge of the Supreme or County Courts under s. 108(1). On the issue of valuation, this a matter which could have been within the jurisdiction of the Board by virtue of s. 99 of the Assessment Act since it was also a matter within the jurisdiction of the

Regional Assessment Appeal Court. But since valuation was not appealed to the Appeal Court and no decision was made upon this question, the Board is unable to assume jurisdiction to hear the issue of valuation. Since this appeal is the first involving the Board's jurisdiction on matters of exemption from taxation, the Board denies the request by the Director for costs.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by PHILIP CLAY, from a decision of the Regional Assessment Appeal Court, Inverness-Victoria-Richmond Assessment Region, made July 18, 1983, respecting property located at Logan's Glen, Inverness County.

BEFORE:	ELIZABETH LAWRENCE, Vice-Chairman DARRYL WILSON, C.A., LL.B., Member
COUNSEL:	PHILIP CLAY appearing on his own behalf without Counsel MARIAN F.H. TYSON, LL.B., for the Director of Assessment.

DECISION

At the request of the Appellant and with the consent of all parties, this appeal was heard on October 6, 1983, at the Expropriations Compensation Boardroom, 1660 Hollis Street, Suite 904, Halifax, Nova Scotia.

Notice of Appeal dated August 22, 1983, (Exhibit C-1) was received by the Board August 22, 1983, appealing the decision of the Regional Assessment Appeal Court, Inverness-Victoria-Richmond Assessment Region (Exhibit C-3) dated July 18, 1983, which decision confirmed the 1983 assessment of the Appellant's property at Logan's Glen, Inverness County, Nova Scotia. The Notice of Appeal does not state the grounds of the appeal. The decision of the Regional Assessment Appeal Court indicates that the grounds of appeal to that court were "wrongly classified."

The subject property consists of 136 acres of wooded and abandoned farmland at Logan's Glen, located on a dirt road one and one-half miles off Highway 105 near Aberdeen, Inverness County. The subject property was purchased by the Appellant, Philip Clay, in 1980. At that time the property was assessed according to the evidence of Mr. Donald MacAulay, the Assessor, as "forest resource exempt" and in 1982 the property was assessed as "resource general" and it is that change which the Appellant contests.

It is not in dispute that the Appellant appealed to the Regional Assessment Appeal Court the assessment classification only and not the valuation of his property. In response to letters and telephone calls from Counsel for the Director prior to the hearing before this Board, the Appellant stated in a letter to Counsel for the Director dated October 3, 1983, that his intentions were "to appeal first the classification and then the valuation." At the commencement of the hearing the Appellant confirmed that he wishes to reserve the right "to argue valuation on another day."

Counsel for the Director argued that the Board did not have jurisdiction to hear the issue of valuation since valuation was not a ground of appeal to the Regional Assessment Appeal Court or an issue considered by that Court in its decision. Section 99 of the Assessment Act which provides for an appeal to this Board specifies that "any person aggrieved by a decision of the assessment appeal court" (emphasis added) may appeal. Counsel for the Director argued that since there was no decision on valuation by the Regional Assessment Appeal Court, the issue of valuation could not be appealed to this Board. Further, Counsel for the Director argued that if the Board found that it had jurisdiction to hear the appeal on valuation, a deferral would be requested on the hearing of this issue because of the short notice given by the Appellant of this additional ground of appeal.

The Appellant argued that the total amount of his taxes was the issue to him and since he had been unable to attend the Regional Assessment Appeal Court hearing, the Board should have the authority to hear any issue the assessment appeal court could have heard. He agreed however that the issue of valuation, if heard, could be heard at another time.

The Board reserved decision on the issue of its jurisdiction to hear the appeal on the valuation of the subject property.

At the commencement of the hearing, Counsel for the Director raised a preliminary objection to the Board's jurisdiction to hear the appeal on the merits. Counsel for the Director argued that the appeal involved a question of exemption from taxation rather than classification and therefore the Board did not have jurisdiction. The Appellant argued that since the Regional Assessment Appeal Court heard the appeal, the Board had jurisdiction to hear it as well. The Board heard argument on this issue of jurisdiction, reserved decision, and heard evidence and argument on the merits of the appeal.

In developing her argument that the issue before the Board is one of exemption from taxation rather than classification, Counsel for the Director cited the following sections of the Assessment Act, Chapter 14, R.S.N.S., 1967 as amended:

"25(1) All assessments shall be designated as being residential property, commercial property or resource property, or partly one and partly another."

"1(nb) "resource property" means:

(i) farm property;

(ii) forest property owned by a person who owns less than fifty thousand acres of forest property in the Province;

(iii) land of a municipal water utility, excluding any building or structure thereon;"

"1(eb) "forest property" means any lot of land, excluding any buildings or structures thereon, not used or intended to be used for residential or commercial or industrial purposes or any combination of such purposes;"

40B(1) All forest property bona fide used or intended to be used for forestry purposes shall be exempt from taxation under this Act or any other public or private Act of the Legislature authorizing a tax on the assessed value of property, except as provided in this Section."

From these sections of the Act, Counsel for the Director concluded that there are only three classifications of property defined in the Act - residential, commercial or resource - and that resource property may be either taxable or exempt but is nevertheless still resource property. Counsel for the Director argued that Section 40B(1) which provides for an exemption from payment of municipal taxation provided that the property is "bona fide used or intended to be used for forestry purposes" does not alter the classification of the property as resource and that the partial exemption from tax provided for in Section 40B(3) for qualifying properties does not constitute a separate classification because Section 25(1) sets out three classifications only.

Arguing that the issue is one of exemption from taxation - whether the subject property properly qualifies for a partial exemption from taxes under Section 40B of the Assessment Act - Counsel for the Director cited Edgehill School v. Town of Windsor and Director of Assessment (1979), 32 N.S.R. (2d) 263 N.S.S.C., a decision of the Appeal Division of the Nova Scotia Supreme Court, which decided that the Regional Assessment Appeal Court did not have jurisdiction to determine a question of exemption from taxation under Section 3(c) of the Assessment Act in force in 1978, which is the same as Section 3(1)(d) of the present Assessment Act.

The relevant parts of that decision are paragraphs 20 to 22 as follows:

> "20 The regional court on a town's appeal can only deal with matters referred to in s.77(2) of the Act, which as enacted by Stats. N.S. 1975, c.57, s.7, and amended by Stats. N.S. 1976, c.2, s.9 and 1977, s.20 provides:
>
> > 77(2) Any ratepayer or the clerk of any town or municipality complaining that a person has been wrongfully inserted in or omitted from the roll or that property of a person has been undervalued or overvalued by the assessor or that property of a person has been wrongfully classified may give notice in writing to that person and to the clerk that he appeals from such insertion, omission, valuation or classification and shall give a name and address where notices may be served upon him by the clerk or the respondent.
>
> 21 A challenge of exemption is clearly not a matter of a person having been wrongly omitted from the roll or

> of property being wrongly "classified", which relates to the classifications referred to in the Act, e.g., residential, farm, timber property, etc.
>
> 22 A question of exemption is, in my opinion undoubtedly a "question relating to the assessment" which may be submitted to the Supreme Court or to the county court under s.108(1) and is not a question of the type excluded from s.108(1) and reserved to the regional court under s.77. Section 108(1) of the Act, R.S.N.S. 1967 c.14, as amended by Stats. N.S. 1976, c.2, s.15 and 1978, c.18, s.26, reads:
>
> > 108(1) The Town or municipality, the Director or any person assessed may apply on originating summons to the Supreme Court or to the county court for the determination of any question relating to the assessment, except a question as to persons alleged to be wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum or whose property is wrongly classified."

The preliminary issue in this appeal is whether the ground of appeal of Mr. Clay that his forest property should be assessed as resource exempt and not resource general is a question relating to the wrongful classification of his property or a question relating to whether or not Mr. Clay's property is exempt from taxation pursuant to Section 40B(1) of the Assessment Act. Further, if it is determined that the ground of appeal is a question of exemption from taxation pursuant to Section 40B(1), does the Board have jurisdiction to consider and decide this type of issue?

Section 25 of the Assessment Act clearly sets out the three classifications of property possible: "residential property, commercial property or resource property, or partly one and partly another." The subject property is classified as resource and could logically be classified no other way. In the opinion of the Board, whether or not the property should additionally qualify for a partial exemption from taxation pursuant to Section 40B of the Act is a question of exemption from taxation and not a question of classification of property.

The Edgehill School case (Supra) although dealing with a question of exemption from taxation pursuant to Section 3(1)(d) clearly sets out the principle that a question of exemption is undoubtedly a "question relating to the assessment" which may be submitted to the Supreme Court or County Court under Section 108(1) and is not a question of the type excluded from Section 108(1) and reserved to the Regional Court under Section 77. In the opinion of the Board the principal enunciated by the Supreme Court in the Edgehill case logically should apply to a question of exemption from taxation under Section 40B(1) as it does to a question of exemption under Section 3(1)(d).

The Board therefore based on the reasoning set forth in the Edgehill case is of the opinion that it does not have jurisdiction to determine whether or not the Appellant's property is exempt from taxation under Section 40B(1) of the Assessment Act as that is a question relating to the assessment which may only be determined by a Judge of the Supreme or County Court under Section 108(1) of the Assessment Act.

Although the Board heard evidence relating to the question of exemption, it will not express an opinion on the merits because in its opinion that is a matter for consideration by the Supreme Court or County Court.

As stated earlier in the decision, the Appellant raised the issue of valuation of the subject property shortly before this hearing. Valuation is a matter within the jurisdiction of the Regional Assessment Appeal Court by virtue of Section 77 of the Act, and within the jurisdiction of the Board by virtue of Section 99 of the Act. The issue of valuation was not appealed to the Regional Court and no decision was made on the issue by the Regional Assessment Appeal Court. The only way such an issue may come before the Board is by way of an appeal under Section 99 of the Act from a decision of the Regional Court relating to the valuation issue. In the opinion of the Board, since no such decision was made, no appeal on the issue of valuation lies to the Board. The Board is unable to assume jurisdiction to hear the issue of valuation of the subject property.

Counsel for the Director requested costs, citing the considerable expense of preparation for this appeal relative to the tax dollars involved. This appeal is the first to be heard by the Board involving the Board's jurisdiction on matters of exemption from taxation allowed by the Assessment Act. For that reason the Board denies the request by the Director for costs.

An Order will issue accordingly.

DATED at HALIFAX, NOVA SCOTIA, this 22nd day of March, A.D., 1984.

E A Lawrence

ELIZABETH LAWRENCE

Darryl W. Wilson

DARRYL W. WILSON

Re J. Duncan C. Motels Ltd. and Town of New Glasgow

ASSESSMENT--COMMERCIAL AND RESIDENTIAL--BUSINESS OCCUPANCY--32-UNIT MOTEL--COST, INCOME AND COMPARATIVE SALES APPROACHES--AGREEMENT BY PARTIES--ASSESSMENT ACT, Ss. 7(2)(a)(iii), (4), 101(1)

This is an appeal by the Director of Assessment from two decisions of the Regional Assessment Appeal Court, Pictou Assessment Region determining the 1982 and 1983 assessments of the 32-unit Tara Motel in New Glasgow to be $275,000.00 and $290,000.00 respectively. Prior to the hearing the Appellant and Director agreed to valuations of $282,000.00 and $294,000.00 respectively. A private real estate appraiser retained by the Director found the market value of the property to be $344,000.00 as of Jan. 1, 1981, with no increase in value in 1982 and 1983. This value was arrived at after calculating and comparing values based on the cost, income and comparative sales approaches. After applying the general level of assessment percentages (82% for 1982; 85.5% for 1983) to his market value figure, the private appraiser arrived at a value for assessment purposes of $282,000.00 for 1982 and $294,000.00 for 1983. Business occupancy tax was also recalculated, taking 25% of the assessed value after deducting the portion of the motel assessment that related to residential use by the manager, and allowing for only 6½ months operation.

HELD--The appeals are allowed.

The Board is obliged by s. 101(1) of the Assessment Act to inquire into and hear evidence on the matter before it notwithstanding agreement on valuation by the parties. Having done this the Board determines the assessments in accordance with the evidence presented. As to costs, the

Appellant agreed to pay $2,836.28 to the Respondent and so there is no need for the Board to make an award.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Ch. 14, R.S.N.S., 1967;

- and -

IN THE MATTER OF: Appeals by the Director of Assessment from two decisions of the Regional Assessment Appeal Court, Pictou Assessment Region respecting the 1982 and 1983 assessments of property located at No. 917 East River Road, New Glasgow, known as the Tara Motel, owned by J. Duncan C. Motels Limited.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, Vice-Chairman.

COUNSEL: MARIAN F.H. TYSON, LL.B,
For the Appellant, the Director of Assessment;

BRUCE T. MacINTOSH, LL.B,
For the Respondent, J. Duncan C. Motels Limited.

DECISION

This hearing arose out of two appeals by the Director of Assessment from decisions of the Regional Assessment Appeal Court, Pictou Assessment Region. The first decision filed on July 11, 1983, reduced the 1982 assessment of the Appellant's real property consisting of a 32-unit motel situate at 917 East River Road, New Glasgow from $340,000.00 to $275,000.00. The original 1982 assessment of $340,000.00 was made up of commercial property valued at $325,000.00 and residential property valued at $15,000.00. The second decision of the Regional Court is dated July 28, 1983, and determined the Appellant's 1983 commercial assessment in the amount of $290,000.00 and the residential assessment in the amount of $15,000.00.

The Notice of Appeal respecting the 1982 assessment year (Exhibit T-1) is dated July 27, 1983 and sets forth the following grounds of appeal:

> "1. That the value determined by the Regional Assessment Appeal Court is too low and does not represent the market value of the subject property as of January 1, 1980;
>
> 2. That the Regional Assessment Appeal Court erred in reducing the value of the property to ensure the survival of the business and in finding that a higher capitalization rate should be used to ensure this result;
>
> 3. That the Regional Assessment Appeal Court erred in reducing the value of the property for the 1982 assessment year below the estimate of market value put forward by any of the parties to the appeal;
>
> 4. That the Regional Assessment Appeal Court misinterpreted the requirement for uniformity pursuant to Section 38 of the Assessment Act, and erred in finding that there was a lack of uniformity;
>
> 5. Such other grounds that may appear from the evidence."

The Notice of Appeal respecting the 1983 assessment year (Exhibit T-3) is dated August 16, 1983, and sets forth the following grounds of appeal:

> "1. That the value determined by the Regional Assessment Appeal Court is too low and does not represent the market value of the subject property as of January 1, 1980;
>
> 2. That the Regional Assessment Appeal Court erred in reducing the value of the subject property because the property "was no longer operated on a year round operation";
>
> 3. That the Regional Assessment Appeal Court erred in finding that the subject property was

over assessed;

4. Such other grounds that may appear from the evidence."

The subject motel is located on the west side of the East River Road which is one of three major routes into the Town of New Glasgow from the Trans Canada Highway. The motel lies in the southern outskirts of the Town adjacent to the Aberdeen Hospital and in close proximity to a commercial area of the Town anchored by the Aberdeen Mall, a sub-regional shopping centre.

The land on which the motel is located has an area of 136,950 square feet and the property has a 250 foot frontage on the East River Road. The property is serviced from the Town's water supply system. Sewage from the site is pumped across the East River Road into the Town's sewer system which terminates 30 meters north of the subject land.

There are three buildings on the subject site. Building number one is a one-storey building comprising the north block which consists of 10 motel units each with bathroom and was built in 1966. These units are electrically heated. Building number 2 (the centre block) contains the reception area, a dining room and living quarters for the motel manager. It is a two-storey building with a single storey addition and was built in 1966. This building is also heated electrically. Building number 3 (the south block) contains 22 motel units in a two storey building built in 1966 and is heated by baseboard electric heating.

The subject property is zoned Commercial General (CA) which permits any commercial or industrial uses subject to restrictions relating to odor, nuisance and noise levels.

The appeals were heard by the Board at New Glasgow on November 8, 1983, and two witnesses gave evidence. They were Michael S. Turner, the President of Turner, Drake & Partners Ltd., and Brian D. Meikle an assessor employed with the Department of Municipal Affairs.

At the commencement of the hearing counsel informed the Board that the Appellant and the Director had reached an agreement that the value of the subject motel for assessment purposes for the 1982 assessment year should be $282,000.00 and for the 1983 assessment year should be $294,000.00.

Mr. Turner is a qualified real estate appraiser and the author of a 65-page appraisal report showing the value as of December 31, 1980, of the subject property known as the Tara Motel. This report filed as Exhibit T-5 was prepared at the request of counsel for the Director and was forwarded to her on January 6, 1982. The letter of transmittal from Mr. Turner stated in part that "In our opinion the market value of the freehold interest in the subject property as of the 31st December, 1980, for assessment purposes, and subject to the limiting conditions and assumptions contained herein, is the sum of $344,000.00".

Mr. Turner stated that his appraisal report was prepared in 1981 and he is still of the opinion that $344,000.00 is the correct value of the subject property as of January 1, 1981. Since his appraisal report he has examined the Appellant's financial statements for the fiscal years ending in May for 1981, 1982 and 1983 and has concluded that there was no increase in value for the property in 1982 and 1983. These financial statements indicated to him that the 1981 year showed an increase in revenue and the years

1982 and 1983 showed decreases in revenue. He also noted that the hotel was closed during the winter months of the 1983 fiscal year whereas at the time he had prepared his appraisal report the motel was a year-round operation.

The Turner report indicates that the highest and best use of the property is a continuation of the existing motel use. The report arrives at a final value after considering the usual three approaches to value, namely the cost, income and comparative sales approaches. Mr. Turner arrived at a value of $355,000.00 by the reproduction cost approach less economic and physical obsolescence, plus land value. His estimate of land value amounts to $132,000.00 which he arrived at by valuing the land "as if vacant and available for redevelopment".

Using the income approach he arrived at a valuation of $302,000.00 calculated from a statement showing stabilized income (page 31 of the report). This statement shows gross revenue of $136,834.00 from which operating expenses of $87,117.00 were deducted to obtain a net operating income of $49,717.00 and then applying a capitalization rate of 15.125% to the net operating income he arrived at a "capital value" of the real estate, fixtures, furnishings and equipment of $328,707.00 from which he deducted his estimate of the value of the fixtures, furnishings and equipment of $27,200.00 to obtain a "capital value" of the real estate in the amount of $301,507.00 which he rounded to $302,000.00.

The cap rate of 15.125% is a composite rate obtained by Mr. Turner from an analysis of other income producing properties which produced a cap rate of 11% to which was added the real estate tax rate of 3.3% and an effective tax rate of .825% for Business Occupancy taxes (25% of 3.30%). Taxes were included in the composite cap rate as taxes were not included in the expenses shown on the stabilized income statement.

Mr. Turner's report indicates that his figure of $27,200.00 as his value for fixtures, furnishings and equipment was estimated from a replacement cost figure of $80,000.00 less depreciation of 66%. He used this figure "in the absence of more concrete data".

In arriving at a valuation by the use of the comparative sales approach method, Mr. Turner analysed sales data of other motels in the Province of Nova Scotia and selected 19 sales which he considered were not "forced sales" and which were the most comparable to the subject property. The sale prices of these motels included furnishings and equipment necessary for motel operation. Mr. Turner adjusted these sale prices to the valuation date (January 1, 1980) at an annual compound rate of 6.24% based on the average annual compound increase in prices over the ten year period covered, that is 1971 - 1981. From this analysis he arrived at a value of $11,500.00 for each motel unit including motel furnishings in the subject property and by multiplying this figure by the number of units in the subject property (32) he arrived at a value of $368,000.00 from which he deducted his estimate of the value of the motel furnishings of $27,200.00 to obtain a capital value of the subject real estate of $340,800.00 which he rounded to $341,000.00.

Mr. Turner using a variation to the comparative sales technique arrived at a second valuation of $360,700.00 rounded to $361,000.00 for the real estate only. He calculated the value of the real estate and fixtures, fittings and equipment in the amount of $353,728.00 by multiplying the number of motel units (32) by $11,054.00, being the actual sale price of the subject property per unit adjusted for price increases at an annual compound rate of 6.24% to January 1, 1980. He then added the cost of a 1977 expansion to the subject motel adjusted for price increases to January, 1980, and then deducted depreciation on the adjusted expansion cost to arrive at a depreciated reproduction cost of $34,172.00 which added to the value of the real estate and fixtures, fittings and equipment resulted in a value of $387,900.00 for real estate, fixtures, fittings and equipment. He then deducted the estimated value of the fixtures, fittings and equipment to obtain a value of $360,700.00 rounded to $361,000.00 for real estate only.

From his estimate of value of $355,000.00 by the reproduction cost approach, $302,000.00 from the income approach and the two figures of $341,000.00 and $361,000.00 from the comparative sales approach method, Mr. Turner, then concluded that the second comparative sales approach figure of $361,000.00 was the "most reliable indicator of value, since we are working from a known sale price with known costs of improvements".

Mr. Turner's final estimate of value was arrived at by weighting each of the four valuation figures and then taking the weighted average of the four. The weights given to each value were based on Mr. Turner's estimate of the reliability of each approach as an indicator of value. The weighted average of

$343,727.00 was rounded to $344,000.00, and this figure according to Mr. Turner's evidence represents the market value of the subject property as of December 31, 1980 and also represents the market value for the years 1982 and 1983.

To obtain figures representing the value for assessment purposes for the 1982 and 1983 assessment years Mr. Turner stated that based on Judge O'Hearn's decision in the Scotia Square case he was obliged to apply the general level of assessment percentages to his market value figure of $344,000.00 which he gave as 82% for 1982 and 85.5% for 1983. Applying these percentages he arrived at a value for assessment purposes for 1982 of $282,000.00 and $294,000.00 for 1983. He obtained these levels of assessment figures (the ratio of assessments to sale prices) from Mr. Brian Meikle the local assessor.

Mr. Turner's evidence concluded with his statement that based on the assumption that he had been given the correct figures for the general level of assessment for the years 1982 and 1983, the figures of $282,000.00 for 1982 and $294,000.00 for 1983 were in his opinion the proper values for assessment purposes of the subject property for the two years in question.

In the Scotia Square case (C.H. No. 34806) referred to by Mr. Turner, Judge O'Hearn, Judge of the County Court for District Number One, in determining the value for assessment purposes of the large Halifax complex consisting of apartment towers, office towers, a trade mart and mall and parkade noted that his decision arose from one of the last appeals heard by a County Court Judge in Nova Scotia and made some general observations about the assessment process and some particular observations about the application of the general level of assessment in the determination of value for assessment purposes.

Judge O'Hearn observed at page 84:

> "The case law and the evidence suggest two things:
>
> 1. the assessors are fundamentally mistaken in fixing a level of assessment and sticking with it year after year;
>
> 2. it is no longer economical or otherwise practical to make a complete revision of the assessments periodically".

Judge O'Hearn continues at pages 84 and 85 to say that:

> "A review of the cases, previously cited, concerning the need for uniformity as a dominant factor does not show any expression by our Court of Appeal condoning the fixing of an assessment at the same level over a period of years, unless that represents the actual cash value or market value in contemporary terms. Instead of fixing a level for a period, what is clearly called for is the raising of values from year to year if that, in fact, is what is happening to money and to real-estate values. The level-of-assessment concept has received sufficient recognition by the courts to justify this simply by the application of the level of assessment formula. That is, every assessment could be multiplied by the same factor to bring it up to the presumptive level for that year.
>
> This would, of course, not mean that individual assessments would be discontinued. Quite apart from those that have to be undertaken because of changes in the property or in its use, there would be a need to revise the assessment of every property from time to time, but it is clear from the evidence that this need not be done and, indeed, cannot be done within the limited time presumed by the former legislation that required periodic revisions. What the Act now requires is both uniformity and an assessment at the market value, and this can be sufficiently achieved by the employment of (a) the level-of-assessment formula; (b) periodic re-examination of each property on a rotating basis; and (c) the appeal process."

Earlier in the Scotia Square decision Judge O'Hearn after stating that "uniformity of assessment" is a dominant principle under the Assessment Act went on to comment on the concept of the general level of assessment at page 31 of his decision by stating that:

> "It is necessary to look at the facts more close to determine what actually is done in order to weigh more exactly the value of the devices employed, especially the concept of 'the general level of assessment'. Before doing so, I should remark that the general level of assessment has been approved by the Appeal Division on several occasions as a means of achieving uniformity, although everyone realizes that it is intrinsically a very rough instrument."

Also at page 32, Judge O'Hearn states that:

> "The general level of assessment, as that concept is reduced in practice to figures, is subject to the same kind of constraints and limitations as the assessment process itself. In practice, it is determined by comparing sales of properties during the course of a year with the assessed values of those properties. To secure a weighted average, the aggregate of the assessed values is taken as well as the aggregate of the sales prices, and the former is divided by the latter to give a decimal fraction, which is then usually converted into a percentage. Mrs. McCluskey testified that this is done at the beginning of every year, using the previous year's sales and the result is used as the general level of assessment for the year in which the calculation is made, especially in dealing with any new properties that have to be assessed or with any reassessments or appeals."

Further at page 35 Judge O'Hearn states that:

> "The purpose of using the general-level-of-assessment factor is to assign to the present actual cash value of the property figures that will reflect its value compared to the other properties in the assessment area at the base date for the current assessment. It is assumed that these other properties have retained their relative values since the reassessment base date although the figures representing those values are no longer accurate with respect to present money values. The assumption is a workable one because most properties will be within a reasonable range of the average, and because any assessment that strays far from the average can be corrected by appeal. In other words, this computational structure works reasonably well to measure comparative values

> on a uniform basis while permitting any marked deviations to be dealt with."

The Board adopts the reasoning of Judge O'Hearn and by applying the general level of assessment for the years 1982 and 1983 to the market value of the subject property arrives at the correct value for assessment purposes for those years.

Brian D. Meikle a Senior Assessor employed by the Department of Municipal Affairs who has been an assessor since April 1, 1968, gave evidence. He stated that he calculated the general level of assessment for 1982 at 82% by using 107 actual sales in the Town of New Glasgow in 1981. He then calculated the percentage of assessment to sale price for each sale and took the median average as the general level of assessment for 1982. To obtain the 1983 general level of assessment he carried out the same type of calculations based on 71 actual sales in the Town of New Glasgow for 1982 to arrive at a general level of assessment of 85.5%.

One further matter needs to be addressed and that is the determination of the business occupancy assessment (B.O.A.) for 1982 and 1983. Mr. Meikle was recalled to give evidence on the calculation of these assessments. He indicated that the proper calculation of B.O.A. for the normal situation is to take the total assessment for the year and multiply it by 25% in accordance with the provisions of the Assessment Act (Section 7(2)(a)(iii)).

However in the instant case this calculation would not produce the correct B.O.A. because a portion of the total assessment of the property comprises a residential use and the value of this portion would have to be deducted from the total assessment to obtain the commercial assessment value before applying the 25%. The residentially used portion of the property is the apartment occupied by the motel manager. Counsel at the hearing before the Board agreed that $15,000.00 represented the market value of the apartment for 1982. On questioning by Counsel for the Appellant Mr. Meikle stated that he would have to convert the 1982 market value of the residential portion of the property to the 1982 assessment value by applying the general level of assessment of 82%. Thus the 1982 assessment value of the residential portion is $12,300.00 (82% of $15,000.00).

The calculation therefore of the 1982 B.O.A. is as follows:

$$
\begin{array}{r}
\$282{,}000.00 \\
\underline{-12{,}300.00} \\
269{,}700.00 \\
\underline{\times \qquad .25} \\
\$\ 67{,}425.00\ \text{(B.O.A.)}
\end{array}
$$

For the year 1983 Mr. Meikle indicated that Section 7(4) of the Assessment Act would apply as the subject property was only occupied for business purposes for 6½ months of the year. Section 7(4) reads as follows:

> "In the case of a business included in clause (a) of subsection (2), where the business is closed for at least four months of the year, the business occupancy assessment shall be that proportion of the business occupancy assessment otherwise assessable that is equal to the proportion of the year that the business is usually open."

Mr. Meikle then calculated the 1983 B.O.A. as follows: Firstly, he calculated the 1983 value for assessment purposes of the residential portion by applying the general level of assessment of 85.5% to the market value of $15,000.00 to arrive at a figure of $12,825.00. He then deducted the figure of $12,825.00 from the 1983 total assessment figure of $294,000.00 to arrive at the commercial assessment for 1983 of $281,175.00. He then multiplied this figure by 25% to obtain a figure of $70,293.00 which he then multiplied by $\frac{6.5}{12}$ to allow for 6½ months occupancy to arrive at a B.O.A. for 1983 in the amount of $38,075.00.

At the commencement of the hearing Counsel for the Respondent stated that in addition to an agreement by the parties on the total assessment value for 1982 and 1983 the parties had agreed on the payment of costs by the Appellant to the Respondent in the amount of $2,836.28. Counsel for the Appellant concurred in this statement. Notwithstanding this agreement by Counsel, the Board considered it was obliged under the provisions of Section 101(1) of the Assessment Act to inquire into the matter and hear evidence in order to support the Board's findings. Section 101(1) reads as follows:

> "The Nova Scotia Municipal Board shall inquire into the matter de novo, and shall examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter".

On the matter of costs it is the opinion of the Board that it need not make an award of costs as clearly the Appellant through his solicitor has undertaken to pay the Respondent costs in an agreed amount.

The Board therefore allows the appeals and based on the evidence adduced and the agreement of counsel determines that the 1982 assessment of the subject property is the sum of $282,000.00 made up of $269,700.00 commercial assessment and $12,300.00 residential assessment and the 1983 assessment is the sum of $294,000.00 made up of $281,175.00 commercial assessment and $12,825.00 residential assessment.

The Board also determines the 1982 business occupancy assessment in the amount of $67,425.00 and the 1983 business occupancy assessment in the amount of $38,075.00.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 22nd day of March, A.D., 1984.

RHBlois

R.H. BLOIS

EALawrence

ELIZABETH LAWRENCE.

Re Atlantic Wholesalers Ltd. et al. and Town of Bridgewater

ASSESSMENT--BUSINESS OCCUPANCY--SHOPPING CENTRE TENANTS--SQUARE FOOT METHOD--RENTAL APPORTIONMENT METHOD--WHICH PREFERABLE--ASSESSMENT ACT, Ss. 7(1), (2), 38

This is an appeal by tenants of the South Shore Mall in Bridgewater from a decision of the Lunenburg Regional Assessment Appeal Court which confirmed their 1983 business occupancy assessments. The shopping centre had been assessed in 1980 and 1981 using the cost method, with each tenant's share being calculated by multiplying the total assessment of the centre by a fraction consisting of the tenant's square footage of leased space over the total square footage of leaseable space in the shopping centre (the square foot method). In 1982, during preparation for an appeal of the 1982 commercial assessment, the Director of Assessment valued the Mall using the income method, and in 1983 calculated the commercial assessment again using the income approach. In determining the 1983 business occupancy assessments of the tenants, the assessed value of the centre is multiplied by a fraction represented by the economic rental income of the space of each tenant over the total economic rental income of the shopping centre (the rental apportionment method). There are two other shopping centres in Bridgewater and they were both assessed using the cost method, with business occupancy calculated by the square foot method, with the result that similar properties in Bridgewater might be said to be treated differently.

HELD--The appeal is dismissed. The Board makes no award for costs.

The specific issue in this appeal is the method which should be used in determining the assessed value of each tenant's space for business occupancy assessment purposes. The Appellants point out that the rental apportionment method works in favour of the "anchor" stores at the expense of the "strip" stores, which tend to be small and locally owned and operated. There are, however, separate rental markets for the space occupied by anchor stores and that occupied by strip tenants and this is reflected in the rents charged. Business occupancy assessment is according to s. 7(2) of the Assesment Act based on the "assessed value of the property occupied or used". The square foot method does not determine the proper assessed value because it results in the same assessed value per square foot for each square foot in the Mall. The Appellants' argument that rental apportionment is unreliable because it is impossible to obtain the correct financial information for the current year is not accepted since financial information is available and it is the responsibility of the assessor to obtain the correct information. The Board also disagrees that uniformity of assessment as required by s. 38 is achieved by using the same method of valuation for each property in the Town. The method used to determine market value may vary and still each property may be valued at its proper market value. The type and nature of property in many instances dictates the best method to determine its market value. Shopping centres are valued in the market on the basis of the income they generate and not on the basis of the cost of reproduction. Uniformity, as Chief Justice MacKeigan stated in Hebb v. Town of Lunenburg, relates to the general level of assessment in the municipality as compared to each property's actual cash value. As to the method of assessing the other shopping centres, they all should have been assessed on the basis of the income approach, with the tenants' business occupancy assessments calculated by the rental apportionment method.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14 R.S.N.S. 1967 as amended;

- and -

IN THE MATTER OF: An Appeal by:

Atlantic Wholesalers Limited
Empire Theatres Limited
Cezanne's House of Fashion Ltd.
Harold's Mens & Boys Wear
Ruth's Fabric Boutique
D & M Health Spa
Cake Decorators Emporium
B.J.'s Pizza House
Lawtons Drug Store
Video Connection

from the decision of the Lunenburg Regional Assessment Appeal Court respecting their 1983 business occupancy assessment

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, Vice-Chairman
DARRYL W. WILSON, C.A., LL.B., Member

COUNSEL: MARIE MacDONALD, on behalf of the Appellants without Counsel;

MARIAN F.H. TYSON, LL.B., for the Director of Assessment.

DECISION

The Appellants appealed the decision of the Chairman of the Lunenburg Regional Assessment Appeal Court dated April 29, 1983 which decision confirmed their 1983 business occupancy assessments. All the Appellants are tenants in the South Shore Mall which is situated in the Town of Bridgewater. The hearing of the appeal took place on November 3rd and 14th, 1983, in the Council Chambers of the Town of Bridgewater.

The issue in this appeal is the determination of the business occupancy assessments of the Appellants' premises for the 1983 assessment year.

Section 71(1) of the Assessment Act, R.S.N.S. c.14 provides for the levying of a business occupancy assessment and it reads in part as follows:

> "7(1) In addition to any assessment of property under this Act, every person occupying or using any commercial property except .... shall be assessed for a sum to be called 'business occupancy assessment'".

Section 7(2) provides for the computation of the business occupancy assessment and it reads in part as follows:

> "7(2) Business occupancy assessment shall be computed by reference to the assessed value of the property occupied or used as follows:.......... ...."

Section 38 of the Assessment Act reads as follows:

> " All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

Evidence during the hearing was given by Marie MacDonald, Harold Gleeckman and Clifton Burgoyne on behalf of the Appellants and by Mr. John MacKay on behalf of the Director of Assessment.

There are three shopping centres located in the Town of Bridgewater including the South Shore Mall. When the Assessment Division of the Department of Municipal Affairs reassessed all properties in Nova Scotia in 1980 for the 1981 assessment year, all three shopping centres in the Town of Bridgewater were valued by the cost method and the assessed values of the space occupied by the tenants in the three malls were determined by apportioning the assessed value of the Mall among the tenants by a fraction represented by the number of square feet of leased space occupied by each tenant over the total square footage of leaseable space in the shopping centre. This method is referred to as the square foot method. It resulted in each square foot of space in the shopping centre having the same value per square foot for assessment purposes.

The 1982 commercial assessments of the three shopping centres remained the same as the 1981 assessments and likewise the business occupancy assessments in the three Malls remained the same. However, the owner of the South Shore Mall appealed its 1982 commercial assessment while the owners of the other two Malls did not appeal their 1982 commercial assessments. In preparing for the appeal hearing respecting the 1982 commercial value of the South Shore Mall, the Director of Assessment valued the South Shore Mall by the income method and not the cost method which was initially used in determining the 1982 commercial assessments of the South Shore Mall and the other two shopping malls in the Town.

In 1983 the Director of Assessment valued the South Shore Mall by the income method and in determining the business occupancy assessments of the tenants of the South Shore Mall apportioned the assessed value of the Mall among the tenants by a fraction represented by the economic rental income of the space occupied by each tenant over the total economic rental income of the shopping centre. This method of apportioning the assessed value of the shopping centre among the tenants is referred to as the rental apportionment method. The effect of the change in method of apportioning the assessed value of the shopping centre for business occupancy assessment purposes was to decrease the assessed value of the space occupied by the Metropolitan Store (an anchor store tenant) and to increase the assessed value of the space occupied by all the other tenants in the Mall. In 1983, the Director of Assessment continued to value the other two shopping centres in the Town of Bridgewater on the cost method and to apportion the assessed value of those Malls for business occupancy assessment purposes by the square foot method.

The result of the Director's actions is that similar properties in the Town of Bridgewater were treated differently for purposes of the 1983 assessment. One of the reasons advanced by Mr. John McKay, Assistant Provincial Director of Assessment, for using the income approach to value the South Shore Mall for 1983 and the rental apportionment method to apportion the assessed value of the Mall among the tenants was that he was bound by the County Court decision in the case of Zeller's Limited v. The Town of New Glasgow and The Director of Assessment, 1981 C.P. 07861, where Judge Lusby decided that the income approach is an appropriate approach to use to value shopping centres for assessment purposes and the rental apportionment method is the appropriate method to allocate the assessed value of shopping centres among tenants when the shopping centre is assessed by the income apparoach. For reasons not explained satisfactorily at the hearing, the Director decided to be bound by this decision of the County Court in the assessment of the South Shore Mall but not in the assessments of the other two shopping centres in the Town of Bridgewater for 1983.

Ms. Marie MacDonald represented the Appellants at the hearing and gave evidence on their behalf. She is the owner of Cezanne's House of Fashion Limited, one of the Appellant tenants. She is also Executive Director of the South Shore Mall Merchants Association and the local representative of the Mall Manager.

In the opinion of Ms. MacDonald, the rental apportionment method used by the Director of Assessment to apportion the assessed value of the South Shore Mall among the tenants of the Mall is inappropriate. Ms. MacDonald introduced as Exhibit S-5 three statements showing property operating expenses for the South Shore Mall for the years 1979, 1980 and 1981. These statements were prepared by Doane, Raymond and Company, Chartered Accounts on behalf of the owners of the Mall, Leribest Holdings Ltd., and were distributed to those tenants of the Mall who were required by lease to pay their proportionate share of common area maintenance and other rental charges to the Mall owner. These statements indicate that the yearly property expenses for each of the years mentioned were different from the yearly property expense figures used by the Assessor in his determination of market value of the South Shore Mall. In all three years, the expense figures produced by Ms. MacDonald were less than the expense figures used by the Assessor in his estimate of the market value of the Mall. According to Ms. MacDonald, these statements indicate that it is impossible for the Assessor to obtain accurate net operating income information in time for the year he assesses the South Shore Mall. As a result, she said that the rental apportionment method of allocating the assessed value of the Mall is not a reliable method to determine the assessed value of each tenant's space.

Ms. MacDonald disagreed with the rents assigned by the Assessor to the space occupied by certain tenants. According to Ms. MacDonald, the Assessor received all his information from the landlord and did not contact any of the tenants to confirm the information supplied. Ms. MacDonald said that 1982 was a difficult year for all Mall tenants because of the poor economic climate. As a result, she said the landlord verbally altered some of the rental agreements in order to keep tenants in the Mall. According to Ms. MacDonald, the actual rental income for some of the leased space should be lower than the amount used by the Assessor.

Ms. MacDonald also introduced as Exhibit S-4 a comparative study of ladies retail clothing outlets in the Town of Bridgewater. The purpose of this exhibit was to show the non-uniformity in business occupancy assessments for 1983 among ladies retail clothing outlets in the Town of Bridgewater. According to Ms. MacDonald, a ladies shop located in downtown Bridgewater similar in area, using the same mark-up and carrying the same merchandise as a ladies shop in the South Shore Mall is assessed at one-half the value of the ladies shop in the South Shore Mall. In the opinion of Ms. MacDonald, the Assessor, by calculating business occupancy assessments for tenants in the South Shore Mall by the rental apportionment method and business occupancy assessments for tenants of other Malls in the Town and for businesses located in downtown buildings by the square foot method, is not having regard to the assessment of other properties in the Town so as to ensure that taxation falls in an uniform manner upon all property in the Town for 1983 as required by Section 38 of the Assessment Act.

Ms. MacDonald also introduced as Exhibit S-7 a statement showing the effect of the change in method of determining business occupancy assessment on the business occupancy assessments of all tenants in the Mall for 1983. According to this statement, the Metropolitan Stores' business occupancy assessment will be reduced 45% while the business occupancy assessments of each of the remaining tenants will be increased in a total amount equal to the 45% reduction for the Metropolitan Stores. According to Ms. MacDonald, this is not fair because it increases the tax costs of small businesses who can't afford further increases in taxes or expenses.

By using the rental apportionment method, Ms. MacDonald said large anchor stores are rewarded with lower business occupancy assessments because they can negotiate low lease agreements with the Mall owner and developer while the small business person is penalized because he can't negotiate low net lease agreements. As a result, Ms. MacDonald said the rental apportionment method favors the large national stores at the expense of the smaller locally owned and operated stores.

Ms. MacDonald also said that the use of the rental apportionment method in determining business occupancy assessment is more a form of income tax than property tax because the method determines a base for taxation based on the gross income of a tenant since many tenants pay their rent on a percentage of sales. According to Ms. MacDonald, if this method is to be used, assessments should be related to profit margins and not sales levels.

According to Ms. MacDonald, the square foot method is the appropriate method to determine the assessed value of space occupied by tenants in the shopping mall because one assumes the business occupancy tax should be based on the space occupied and not the income the space generates. In Ms. MacDonald's opinion, since the real property tax for the South Shore Mall is allocated among the tenants by the landlord under the terms of their leases on the basis of the number of square feet occupied, the assessed value of the Mall for purposes of determining business occupancy assessment should be allocated among the tenants on the same basis, that is, the number of square feet occupied. Ms. MacDonald also said that the use of the square foot method to allocate the assessed value of the Mall would mean all the tenants would be assessed by a uniform method. A tenant occupying 20% of the Mall space would be assessed for 20% of the assessed value of the Mall. According to Ms. MacDonald, the rental apportionment method does not result in a uniform method of allocating the assessed value of the Mall because one store may occupy 46% of the Mall area but only be allocated 28% of the assessed value of the Mall for business occupancy assessment purposes.

Mr. Harold Gleekman is the owner of Harold's Mens Wear, one of the Appellant tenants. In Mr. Gleekman's opinion the change in method of apportioning the assessed value of the Mall is not fair. Mr. Gleekman said that his store is the only men's store in the Town of Bridgewater being assessed on the basis of the rent paid for the space occupied and in his opinion that is not uniformity of assessment as required by Section 38 of the Assessment Act.

Mr. Clifton Burgoyne, called as a witness on behalf of the Appellants, retired on October 31, 1983 as the Regional Director of Assessment for the Lunenburg Assessment Region. Mr. Burgoyne valued the South Shore Mall for the 1982 assessment year by the cost method and allocated the assessed value of the Mall among the tenants by the square foot method for business occupancy assessment purposes. Although called by the Appellants, Mr. Burgoyne agreed with the use of the income method to value the South Shore Mall for 1983 and the use of the rental apportionment method to allocate the assessed value of the Mall among the tenants for purposes of determining business occupancy assessment for 1983. In Mr. Burgoyne's opinion, the rental apportionment method should be used to allocate the assessed value of the space occupied by each tenant for business occupancy purposes when the Mall itself is valued by the income method.

Mr. John MacKay, Assistant Provincial Director of Assessment gave evidence on behalf of the Director of Assessment. Mr. MacKay determined the commercial assessment of the South Shore Mall as well as the business occupancy assessment of the various tenants located in the Mall for the 1983 assessment year. Mr. MacKay used an income approach to determine the assessed value of the South Shore Mall pursuant to Section 38 of the Assessment Act. This method involves estimating the net income from the property and dividing it by an appropriate capitalization rate taken from the market place. In estimating the net income from the Mall, Mr. MacKay determined the economic rental value of each leaseable space in the Mall. Using this method, Mr. MacKay determined the assessed value under Section 38 of the Assessment Act for the South Shore Mall to be $2,023,600.00 for the 1983 Assessment year. This value is not in dispute in this appeal.

Mr. MacKay determined the assessed value of each tenant's space in the Mall including the Appellants' space by apportioning the commercial assessment of the Mall by a fraction representing the economic rental value for each space occupied over the total economic rental value of the Mall. The resulting assessed value for each occupied space was multiplied by the applicable percentage relating to the tenants business function under Section 7(2) of the Act in order to get the applicable business occupancy assessment.

Mr. MacKay said he used the rental apportionment method for the following reasons:

(1) The decision of Judge Lusby of the County Court for District Number 5 in the case of Zeller's Limited v. The Town of New Glasgow and the Director of Assessment, 1981, C.P. 07860 approved of the rental apportionment method to allocate the assessed value of the shopping mall when the market value of the shopping mall was determined by the income approach.

(2) In his opinion the appropriate method to value shopping centres in accordance with Section 38 of the Assessment Act is the income method and therefore the rental apportionment method more accurately reflects the assessed value of the space occupied by the tenants than the square foot method.

Mr. MacKay reviewed his determination of the rental values per square foot he assigned to each leaseable space in the Mall and his estimated gross economic rental value for each leaseable space. Mr. MacKay's estimates were based on 1981 information even though the assessments under appeal were for the 1983 assessment year. The 1983 assessments remained the same as the 1982 assessments and since the 1981 information was the latest information available at the time of preparing the 1982 assessment, it was used for the 1983 assessment.

In order to determine the market value for the South Shore Mall, Mr. MacKay had to estimate the total gross economic rent of each leaseable space in the Mall. This is determined by multiplying the space occupied by the rental value per square foot. In estimating the rental value per square foot for each leaseable space, Mr. MacKay considered actual rents being paid by existing tenants, asking rentals for the vacancies existing at the time of the assessment and the location of the leased space. In some cases, Mr. MacKay felt the actual rent being paid was the appropriate rental value of the space leased. In other cases, Mr. MacKay assigned a different rental per square foot than that actually being paid by the tenant. According to Mr. MacKay, there are fifteen leaseable spaces in the South Shore Mall. He assigned an economic rent of $4.50 per square foot for the eight leaseable spaces which were located in the area in the Mall known as the central mall area. The $4.50 was based on actual rents being paid for some space in the central mall area as well as the asking price for vacant space in this area. According to Mr. MacKay, five other tenants were assigned a rental value per square foot equal to the actual rent they paid in 1981. The Metropolitan Store was assigned an economic rent of $2.00 per square foot although its actual rate is $1.65 per square foot. The remaining tenant was assigned an economic rent of $4.50 per square foot based on its location and contributions to the Mall even though the lease agreement with the landlord set a rental of $4.11 per square foot.

Mr. MacKay said that he considered the difficult economic climate of 1981 and 1982 in determining the effective gross income of the entire shopping mall. The effective gross income is the total gross economic rental value of all space in the Mall less an allowance for vacancy and bad debts. Mr. MacKay allowed a vacancy and bad debt allowance of 4% which reduced his estimate of the total annual gross economic income of the Mall.

The gross economic rental value of each leaseable space is important not only to help establish a market value for the Mall property but also to allocate the assessed value of the Mall among the various tenants for the purpose of determining their business occupancy assessment said Mr. MacKay.

Mr. MacKay used the actual reported operating expenses for the year ending December 31, 1981 provided to him by the landlord.

Mr. MacKay also said he considered the issue of uniformity of assessment in determining the market value for assessment purposes of the South Shore Mall. To maintain uniformity of assessment between the South Shore Mall and other real property in the Town, Mr. MacKay multiplied the assessed value of the Mall which was assessed at 100% of the market value by the general level of assessment which he determined to be 86%.

While the overall issue in this appeal is the determination of the business occupancy assessments of the Appellants' premises for the 1983 assessment year, the specific issue is the method which should be used by the Director of Assessment in determining the assessed value of each tenant's space for business occupancy assessment purposes. This issue has been considered by the Board on two prior occasions; namely, in the appeal by Hudson Bay Company and F.W. Woolworth Co. Ltd. respecting their 1981 business occupancy assessments in the Mayflower Mall in the County of Cape Breton and in the case of Zeller's Limited located in the North Sydney Shopping Mall respecting its 1981 business occupancy assessment. This issue has also been considered by His Honour Judge Lusby, Judge of the County Court for District Number 5 in the appeal of Zeller's Ltd. v. The Town of New Glasgow and The Director of Assessment (supra).

In the opinion of the Appellants, the rental apportionment method results in an apportionment of the assessed value of a shopping mall in favor of the "anchor" stores at the expense of the "strip" stores (the small and locally owned and operated stores). This results in part because in determining business occupancy assessment, the assessed value of shopping malls for many years was apportioned by the square foot method which resulted in each square foot of leaseable space having the same economic value. As a result, a large national store occupying, for example, 40% of the mall space was assessed for business occupancy assessment purposes 40% of the assessed value of the Mall. During this period, the market value of shopping malls was determined by assessors using a cost approach and the square foot method of allocating the cost of the shopping mall among the tenants for determining business occupancy assessment purposes was considered the most appropriate method. When assessors began to value shopping centres for assessment purposes using the income method, it was obvious that each square foot of leaseable space in a Mall did not have the same economic value. The "anchor" stores occupy a large percentage of the total leaseable space in a shopping mall, usually pay a lower rent per square foot for that space and usually enter into a long term lease. The remaining stores in the Mall individually occupy a small percentage of the total leaseable space in a Mall, pay higher rents per square foot than the anchor stores and have shorter lease terms.

In the opinion of the Board, there are separate rental markets for the space occupied by anchor stores in shopping malls and the space occupied by strip tenants in these malls and this is reflected in the rents charged for each type of space.

In order to calculate a business occupancy assessment pursuant to Section 7(2) of the Act, it is necessary to refer to the "assessed value of the property occupied or used." In the opinion of the Board, business occupancy assessment should not be based on a value determined from a fraction representing the tenants' percentage of the Mall's leaseable area multiplied by the assessed value of the entire Mall but should be based on the assessed value of the space occupied. The Board has interpreted the words "assessed value" as they appear in Section 7(2) as meaning the value of commercial property for assessment purposes determined in accordance with Section 38 of the Assessment Act. In the opinion of the Board the method used to apportion the assessed value of the Mall among tenants must determine an assessed value for each tenant's space in accordance with Section 38 of the Act. In the opinion of the Board, the square foot method does not determine the proper assessed value for the various leaseable parts of the South Shore Mall for the 1983 assessment year because it results in the same assessed value per square foot for each square foot in the Mall.

The Board disagrees with the Appellants' argument that the rental apportionment method is unreliable because it is impossible to obtain the correct financial information for the current assessment year. In the opinion of the Board, financial information is available but it is the responsibility of the assessor to make sure he obtains the correct information. If the assessor does not collect the most reliable data available to determine the assessed value of the space occupied, a tenant may have good grounds for appealing his business occupancy assessment by calling into question the data obtained by the assessor to arrive at the assessed value of the space occupied.

While the Board understands the arguments of the Appellants concerning the benefits to the anchor store and the detriment to the strip stores as a result of the use of the economic rent method vis à vis the square foot method, it must base its decision in determining the proper business occupancy assessments on its interpretation of the meaning of the Assessment Act. In the opinion of the Board, business occupancy assessments are based on the assessed value of space occupied and not a value determined from a fraction representing the tenants' percentage of the Mall's leaseable area multiplied by the assessment value of the entire Mall.

The fact that many landlords apportion their commercial property tax among their tenants on the basis of number of square feet occupied, is a matter of contract between landlord and tenant. In the opinion of the Board, it does not have any relevance in interpreting the provisions of the Assessment Act dealing with business occupancy assessments.

The Board disagrees with the Appellants' argument that uniformity of assessment pursuant to Section 38 is achieved by using the same method of valuation for each property in the Town. The market value of each property in the Town must be determined separately in accordance with Section 38 of the Assessment Act. The method used by the assessor to determine the market value of each property in the Town may vary and still each property may be valued at its proper market value. The type and nature of property in many instances dictates the best method used to determine its market value. Shopping centres are valued in the market on the basis of the income they generate and not on the basis on the cost of reproduction.

Uniformity has been considered by the Appeal Division of the Supreme Court of Nova Scotia and in Hebb v. Town of Lunenburg (1979), 32 N.S.R. (2d) 427 Chief Justice MacKeigan said at pages 435 to 437:

> "Chief Justice Ilsley commented in Re Mindamar Metals Corporation Limited and Municipality of the County of Richmond.....at p.78:
>
> > If this were a case where there was in the municipality property of a like class with the property the assessment of which is complained of, and also a general level of assessed values of such property of like class which bore a lower ratio to the actual cash value thereof than the ratio of the assessed value to the actual cash value of the porperty whose assessment is complained of, it may very well be that the assessment complained of should be lowered even though it is not in excess of the actual cash value.
>
> In Lehndorff Management Ltd. v. City of Dartmouth... Macdonald, J.A., (p.45) approved the above statements and emphasized that since the Mersey Paper case:
>
> > ...uniformity rather than actual cash value is the dominant and controlling factor in determining the amount at which property is to be assessed.
>
> The uniformity that is thus dominant and controlling is not, however, uniformity unrelated to "actual cash value". "Uniformity" is not to be based on some general community or judicial standard of fairness or value or comparability.
>
> The test of uniformity arises where, as Chief Justice Ilsley said in Mindamar, supra, there is a "general level of assessed values of other properties which bore a lower ratio to the actual cash value thereof than the ratio of the assessed value to the actual cash value of the property whose assessment is complained of..."In Morash v. Municipality of Chester, supra, Ilsley, C.J., referred to Mindamar and Mersey Paper and said (28 D.L.R. (2d) at p.429):

> As will be seen, I do not think that the mere fact that the assessor assessed certain other individual properties lower in relation to their actual cash value than he assessed the appellant's property is ground for allowing the appellant's appeal. It may be that the other assessments are out of line rather than his. I think a comparison between the assessment of the appellant's property and those of others would be relevant only if it were shown that the general level of assessment of properties in the municipality was lower in relation to the actual cash value, as defined in the Assessment Act, R.S.N.S. 1954, c.15, than the assessment of the appellant's property.

At p.430, he continued:

> In assessing the appellant's property, therefore, it was the assessor's duty to determine its actual cash value, but if, because of the failure of the assessor to discharge his duty with regard to the assessment of other properties in the municipality a general level of assessment had been established which was below actual cash values by a fairly definite percentage thereof, it would have been the duty of the assessor to discount for purposes of assessment the actual cash value of the appellant's property to a level which was of the same percentage below its actual cash value.

To show error by the assessor, an appellant such as Mr. Hebb accordingly must either establish that his property was assessed at more than its actual cash value, and here the actual cash value was admitted to be at least $43,900.00, or prove that "the general level of assessment of properties in the municipality was lower in relation to the actual cash value" than was his assessment.

A county court judge in an assessment trial de novo should apply the s.38 rules as directed by Chief Justice Ilsley. He should, I suggest, first ascertain the actual cash value of the property under appeal and determine the ratio of the assessment to that value. He then should determine the "general level of assessment" relative to the actual cash values of properties in the town or municipality generally. To do so he should ascertain on the evidence before him whether the general assessment ratio is what the assessor states it is or whether it is a different ratio. In most cases lack of other evidence may compel him to accept the assessor's ratio. If the ratio is thus higher, the judge should reduce the appealed assessment to conform with the general ratio."

The Board agrees with the Appellants that they are being assessed on a different basis than the tenants in the other shopping malls in the Town of Bridgewater. If the assessed value of the space occupied by the "strip" tenants in the South Shore Mall were determined by the square foot method, the "strip" tenants would be assessed a smaller percentage of the assessed value of the Mall as is the case with the "strip" tenants in the other shopping centres in the Town. The action of the Director of Assessment in assessing the other shopping malls and their tenants differently from the South Shore Mall and its tenants for assessment purposes for 1983 in the Town of Bridgewater has resulted in some taxpayers in the Town feeling that they have not been treated in a fair manner. However, in the opinion of the Board, there is no evidence to indicate that a change in the method of allocating the assessed value of the South Shore Mall for business occupancy assessment purposes affects uniformity of assessment as defined by the Appeal Division of the Supreme Court of Nova Scotia.

In the opinion of the Board, all shopping malls in the Town should have been assessed in a similar manner on the basis of the income method and the assessed value of the malls apportioned to the tenants by the rental apportionment method for business occupancy purposes. In the opinion of the Board, the business occupancy assessments of the South Shore Mall conform with the requirements of the Assessment Act and they should not be altered to agree with business occupancy assessments in other Malls in the Town.

The Board accepts the financial information supplied by the assessor concerning rental rates and expenses. The expense figures used by the Assessor are greater than the figures used by Ms. MacDonald and so benefit the tenants by reducing the assessed value of the Mall more than the expense figures provided by Ms. MacDonald. The Board is also satisfied that the rental rates assigned by the Assessor are reasonable and that the Assessor has provided adequately for vacancy and bad debt expense.

In the opinion of the Board, the rental apportionment method used by the Assessor in determining the assessed value of the Appellants' premises is preferable to the square foot method proposed by the Appellants. The Board also accepts the financial data used by the Assessor in determining the assessed value of the South Shore Mall for 1983 from which the 1983 business occupancy assessments are determined. The Board therefore dismisses the appeal and confirms the 1983 business occupancy assessment for all Appellants in the amount set by the Director of Assessment.

The Board does not make any award for costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia this 27th day of April, 1984.

R.H. BLOIS, Q.C.

ELIZABETH LAWRENCE

DARRYL W. WILSON

Re Hudson's Bay Company and County of Cape Breton

ASSESSMENT--BUSINESS OCCUPANCY--TENANT IN SHOPPING CENTRE--NEW INFORMATION ON LEASED AREA AND RENT--ASSESSMENT ACT, S. 7(2)

This is an appeal by a tenant in the Mayflower Mall in the County of Cape Breton from a decision of the Cape Breton Regional Assessment Appeal Court which confirmed that tenant's 1982 and 1983 business occupancy assessments at $1,297,100.00. The assessments were based on the square footage of the leased premise obtained from a plan acquired when the Mall was constructed in 1980 and an estimate of the rent per square foot made when information concerning actual rent was not forthcoming. The Appellant now supplies details of actual leased area and rent.

HELD--The appeal is allowed.

Both the Appellant and the Regional Director of Assessment gave evidence and are now in agreement on the leased area and rent. Accordingly the Board determines the Appellant's 1982 and 1983 business occupancy assessments to be $935,765.90 rounded to $935,800.00.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967 as amended;

- and -

IN THE MATTER OF: An Appeal by Hudson's Bay Company from the decision of the Chairman of the Cape Breton Regional Assessment Appeal Court respecting the business occupancy assessment of its property located in the Mayflower Mall, County of Cape Breton, Province of Nova Scotia.

BEFORE: DARRYL W. WILSON, C.A., LL.B., Member

COUNSEL: JOHN S. McFARLANE, LL.B., for the Appellant

MARIAN F.H. TYSON, LL.B., for the Director of Assessment

DECISION

This appeal relates to the business occupancy assessment made by the Director of Assessment for the Cape Breton Assessment Region with respect to the premises of Hudson's Bay Company located in the Mayflower Mall in the County of Cape Breton for the 1982 and 1983 assessment years. The business occupancy assessment was set at $1,297,100.00 for both the 1982 and 1983 assessment years and the Regional Assessment Appeal Court confirmed both these assessments. With the consent of both parties, the appeal was heard on February 23, 1984 in the hearing room of the offices of the Expropriation Compensation Board, 1660 Hollis Street, Suite 904, Halifax, N.S.

Evidence at the hearing was given by Mr. Stephen L. Bowyer, on behalf of the Appellant and Mr. Charles Hopkins, on behalf of the Director of Assessment.

Mr. Bowyer is the Real Estate Assessment Manager for Hudson's Bay Company. His duties include reviewing the assessments placed by the various provincial assessment authorities throughout Canada on property owned by Hudson's Bay Company and its related companies. Mr. Bowyer said that the Appellant disagrees with the rental value and gross leaseable area assigned by the assessor to the space it occupies in the Mayflower Mall. According to Mr. Bowyer, the assessor determined the business occupancy assessment of the space it occupies as follows:

Gross Leaseable Area		Rental Rate		Factor		Applicable Percentage under s.7(2) of the Act		Business Occupancy Assess-ment
87,000	x	$6.00	x	4.97	x	50%	=	$1,297,100

The factor of 4.97 is calculated by dividing the assessed value of the Mayflower Mall ($13,700,000.00) by the total economic rental income of the Mall ($2,770,624.00). The assessed value of the Appellant's premises is determined by multiplying the rental income of the Appellant's space by the factor. The Appellant's business occupancy assessment is determined by multiplying the assessed value of the Appellant's premises by the applicable percentage under Section 7(2) of the Act.

Mr. Bowyer produced an architect's certificate which was filed as Exhibit H-8, indicating that the gross leaseable area of the premises occupied by the Hudson's Bay store is 82,944 square feet. Mr. Bowyer also said that the Appellant pays rent to the landlord on 82,944 square feet of occupied space.

According to Mr. Bowyer, the Appellant's actual rent was $4.54 per square foot for both 1982 and 1983 calculated as follows:

A base rent of $3.75 per square foot plus an additional rent based on the lesser of the following:

(a) 1.05 x 75% of tenant's gross leaseable area

or

(b) $\frac{\text{landlord's adjusted cost plus 10\% x tenant's adjusted area}}{\text{adjusted gross leaseable area}}$

Mr. Bowyer said that for both 1982 and 1983 the additional rent was based on option (a) which amounts to $65,839.73 in additional rent. To convert this sum to an equivalent square foot rate, Mr. Bowyer divided $65,839.73 by 82,944 square feet which resulted in a square foot rate of 79¢. By adding the basic rent of $3.75 to the additional rent of 79¢, Mr. Bowyer determined the total actual rent per square foot of $4.54.

Using a rent of $4.54 per square foot and a gross leaseable area of 82,944 square feet, Mr. Bowyer calculated that the business occupancy assessment of the premises occupied by the Appellant should be as follows:

Gross Leaseable Area		Rental Rate		Factor		Applicable Percentage under s.7(2) of the Act		Business Occupancy Assessment
82,944	x	$4.54	x	4.97	x	50%	=	$935,765.80

Mr. Charles Hopkins is the Regional Director of Assessment for the Cape Breton Assessment Region. Mr. Hopkins determined the commercial assessment of the Mayflower Mall Shopping Centre for the 1982 and 1983 assessment year as well as the business occupancy assessment of the Appellant for those years.

Mr. Hopkins said that he visited the Mayflower Mall site when it was being constructed in 1980 and at that time acquired a plan showing the floor area of various tenants of the Mall.

According to Mr. Hopkins, this plan indicated that the leaseable floor area of the Hudson's Bay Department Store was 87,000 square feet. Mr. Hopkins also said he made numerous inquiries beginning in 1980 to Burnac Leaseholds Limited, the landlord, for information on tenant leasings such as name, area leased and rentals. Information was supplied on all tenants except Woolco, Hudson's Bay and Dominion Stores.

Mr. Hopkins said by December 1980 he had to place a valuation on the Mall for purposes of the 1981 assessment. By this time he had obtained the square foot rent for both Woolco and Dominion Stores but not for the Hudson's Bay store. It was necessary for him to estimate the rent for the Hudson's Bay store since the information was not forthcoming. Mr. Hopkins observed that the area leased by Hudson's Bay was midway in size between the area leased by Dominion Stores and Woolco. He determined an appropriate rental for the area occupied by the Hudson's Bay store was $6.00 per square foot. This rent was midway between the rent paid by Dominion Stores and Woolco.

Mr. Hopkins said that it was not until early 1983 that Mr. Bowyer informed him of the area leased and actual rental per square foot being paid by Hudson's Bay Company.

Subsequent to receiving the information, Mr. Hopkins confirmed the gross leaseable area of approximately 83,000 square feet by measurement of the premises. He also was provided with a copy of the Hudson's Bay lease and he agrees that the actual rent paid by the Appellant was $4.54 per square foot for 1982 and 1983.

The evidence of Mr. Bowyer and Mr. Hopkins indicate that the gross leaseable area of the Appellant's space is 82,944 square feet and its actual rent per square foot for 1982 and 1983 is $4.54.

Having heard the evidence and the argument of Counsel, the Board allows the appeal and determines the business occupancy assessment for both 1982 and 1983 for the Hudson's Bay Company to be $935,765.90 rounded to $935,800.00.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 8th day of April, A.D., 1984.

Darryl Wilson

DARRYL W. WILSON

Re A.W. Peters Enterprises Ltd. and City of Dartmouth

ASSESSMENT-COMMERCIAL--BOWLING LANES--ASSESSABLE PROPERTY--JURISDICTION OF THE BOARD--ASSESSMENT ACT, Ss. 1(a)(v), 77, 89(1), 91(1), 99, 101(1), (2)--MUNICIPAL BOARD ACT, Ss. 4(a), (b), 32, 34, 35(1)--BNA ACT, s. 96

This is an appeal by the Director of Assessment from a decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region which determined that the wooden bowling lanes located in two buildings owned by the Respondent were not assessable property within the meaning of s. 1(a)(v) of the Assessment Act. The Respondent contended that the Board did not have jurisdiction to hear the appeal because it did not have authority to determine whether or not the bowling lanes are assessable property. It is argued that the question of whether property is assessable is in essence a question as to whether property is taxable and that is a matter solely within the jurisdiction of a judge appointed pursuant to s. 96 of the BNA Act.

HELD--The Board has jurisdiction and will, when agreeable to the parties, hear the appeal on its merits.

The issue for the Board is whether it has jurisdiction and this depends on whether the Board has authority to determine questions as to the assessability of property. The Board being a creature of statute necessarily derives its jurisdiction under the Municipal Board Act and Assessment Act. In carrying out its functions under the Acts, the Board does exercise judicial power, but it does not do so in a manner analagous to a Superior or County Court. It is clear from s. 32(2) of the Municipal Board Act that the Board is given authority to determine questions of law and fact, although the Board's decisions on questions of jurisdiction and law are appealable with leave to the Appeal Division of the Supreme Court and may also be reviewed by way of certiorari. The assessor must of necessity in carrying out his duties determine what property is assessable and these determinations may be altered by the Director of Assessment. Likewise the Regional Assessment Appeal Court must be able to determine whether property is assessable in order to determine its value and classification for assessment purposes. And this Board on an appeal to it must be able to determine as a matter of law whether property is assessable as a necessary part of the Board's administrative function in finalizing the assessment roll and ensuring that the proper assessment and classification of properties is achieved. The exercise of a judicial power to determine questions of assessability is a proper exercise of that power incidental to carrying out its mandate under the Assessment Act. As well it would appear that prior to Confederation assessment appeals in Nova Scotia were made to non-section 96 courts and therefore the Supreme Court of Canada's decision in Toronto v. Olympia Edward Recreation Club, while establishing the law in Ontario, may not be binding in Nova Scotia. The determination of whether property is assessable is a necessary and integral part of the Board's administrative function in finalizing the assessment roll and within the Board's jurisdiction.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967, ch. 14;

- and -

IN THE MATTER OF: An Appeal by The Director of Assessment from the decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region respecting the assessment of the properties of A.W. Peters Enterprises Limited located at 4 Pine Street Extension and 60 Tacoma Drive in the City of Dartmouth.

BEFORE: R.H. BLOIS, Q.C., Chairman,
ELIZABETH LAWRENCE, Vice-Chairman,
DARRYL WILSON, C.A., LL.B., Member

COUNSEL: MARIAN F. TYSON, LL.B.,
For the Director of Assessment;
Appellant,

JEFF SLIVOCKA, LL.B.,
For A.W. Peters Enterprises Limited
Respondent.

DECISION

This is an appeal by the Director of Assessment from the decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region respecting the assessment of Commercial property in the City of Dartmouth, owned by the Respondent, A.W. Peters Enterprises Limited. The Appellant's Notice of Appeal is dated June 16, 1983, and was filed with the Board on June 17, 1983. The hearing of the appeal was set down for October 17, 1983, at which time Affidavits respecting the service of the Notice of Appeal were tendered by Counsel for the Appellant (Exhibits P-2, P-3 and P-4). Also tendered was a report prepared by Thomas B. Mills, the Assistant Director of Assessment for the Dartmouth Assessment Region (Exhibit P-6), a brief prepared by Counsel for the Respondent, A.W. Peters Enterprises Limited (Exhibit P-7), a supplementary brief prepared by Counsel for the Respondent (Exhibit P-8), a pre-hearing submission prepared by Counsel for the Director of Assessment (Exhibit P-9) and a photocopy of the Regional Assessment Appeal Court's decision (Exhibit P-5).

The grounds of appeal set forth in the Appellant's Notice of Appeal are:

> "1. That the Regional Assessment Appeal Court erred in fact and in law in determining that the bowling lanes are not assessable property under Section 1 of the Assessment Act;
>
> 2. That the Regional Assessment Appeal Court wrongly reduced the assessed value of the subject property by the assessed value of the bowling lanes;
>
> 3. That the assessed value determined by the Regional Assessment Appeal Court is too low, and does not represent the market value of the subject property in accordance with Sections 38 and 39 of the Assessment Act;
>
> 4. Such other grounds that may appear from the evidence."

The Respondent, A.W. Peters Enterprises Limited owns and operates two buildings located at No. 4 Pine Street Extension and 60 Tacoma Drive, Dartmouth, in which are located bowling lanes.

The Regional Assessment Appeal Court decision filed with the Board as part of Exhibit P-5 determined that the wooden bowling lanes in the buildings in question were not assessable property within the meaning of Section 1(a)(v) of the Assessment Act.

At the commencement of the hearing on October 17, 1983, counsel for the Respondent, argued that the Board does not have the jurisdiction to hear the appeal since the Board does not have the authority to determine whether or not the bowling alleys located in the Respondent's buildings are assessable property under Section 1(a)(v) of the Assessment Act, R.S.N.S. 1967, c.14. Section 1(a)(v) states that:

> "Assessable property" means:
>
> "buildings and structures erected or placed upon, in, over, under or affixed to land".

On October 17, 1983, Counsel for the Director was not prepared to fully argue this question and the Board with the consent of Counsel for the Respondent adjourned the proceedings until November 17, 1983, for oral argument on the jurisdictional question. In the interim period counsel filed written briefs on the jurisdictional question. The Board heard argument on the jurisdictional question on November 17, 1983.

The issue for the Board is therefore to determine whether or not it has jurisdiction in this appeal. To decide this issue the Board must decide whether or not it has the authority to determine questions as to the assessability of property under the Assessment Act.

It is noteworthy that no jurisdictional questions were raised at the hearing before the Regional Assessment Appeal Court which determined that the bowling lanes in question were not assessable property under Section 1(a)(v) of the Assessment Act. The Regional Court reduced the commercial assessment of the Respondent's property located at 4 Pine Street by the valuation of the bowling lanes which had been determined by the assessor and which was included in the commercial assessment valuation. It would appear from the

Regional Court's decision that the value of the bowling lanes located in the building at 60 Tacoma Drive was not included in the commercial assessment of that building.

Counsel for the Director argues that the Board does have jurisdiction in this appeal because it has the authority to determine questions of assessability. Counsel for the Respondent argues that whether or not a property is assessable is in essence a question as to whether or not property is taxable and that is a matter solely within the jurisdiction of a judge appointed pursuant to Section 96 of the British North America Act. A review of the arguments presented by Counsel for both parties will be subsequently made in this decision.

The Board being a creature of Statute necessarily derives its jurisdiction and authority to deal with Assessment Appeals under the Municipal Board Act, S.N.S. 1981, c. 9 and under the Assessment Act, R.S.N.S. 1967, c. 14.

Section 4(a) of the Municipal Board Act states that the Board shall:

> "(a) perform such duties as are conferred upon it by this Act, the Planning Act, the Municipal Boundaries and Representation Act, the Assessment Act, the School Boards Membership Act and the Shopping Centre Development Act;
>
> (b) have such other powers and duties as are conferred upon it by an enactment or the Governor in Council."

Section 32 of the Municipal Board Act states that:

> "(1) the Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.

> (2) The Board as to all matters within its jurisdiction under this Act has authority to hear and determine all questions of law or of fact."

Section 34 of the Municipal Board Act states that:

> "The finding or determination of the Board upon any question of fact within its jurisdiction is binding and conclusive."

Section 35(1) of the Municipal Board Act provides for an appeal from an order of the Board to the Appeal Division of the Supreme Court with leave of a Judge of that Court. Section 35(1) states:

> "An appeal shall lie to the Appeal Division of the Supreme Court from any order of the Board upon any question as to its jurisdiction or upon any question of law, but such appeal can be taken only with leave of a Judge of the said Court, given upon an application made to him within thirty days after the issuance of the order and upon such terms as the Judge may determine."

Section 77 of the Assessment Act, R.S.N.S. c. 14 makes provisions for an appeal to the Regional Assessment Appeal Court by

> (1) a person complaining that "he has been wrongfully inserted in or omitted from the assessment roll or that his property has been undervalued or overvalued by the assessor or that his property has been wrongfully classified..."
>
> (2) "any ratepayer or the clerk of any town or municipality complaining that a person has been wrongfully inserted in or omitted from the roll or that property of a person has been undervalued or overvalued by the assessor or that property of a person has been wrongfully classified..."
>
> (3) "any person having an interest in a property complaining that the property has been wrongfully classified..."

and (4) a person complaining that "a property has been undervalued, or has been wrongfully classified, and where the property is occupied by a person who is assessed an occupancy assessment..."

The powers of the Regional Assessment Appeal Court are set out in Section 89(1) of The Assessment Act and are as follows:

> "On any appeal, the court may
>
> (a) confirm, reduce or increase the valuation of the property that is the subject of the appeal, and confirm, reduce or increase an occupancy assessment notwithstanding that the occupancy assessment was not appealed:
>
> (aa) dismiss the appeal;
>
> (b) add to the roll the name and assessment of any person left off the roll;
>
> (c) strike off the roll the name of any person wrongfully entered thereon;
>
> (d) transfer the assessment to the proper person when any property has been assessed in the name of a person who is not legally liable to be assessed therefor;
>
> (e) when any property has been assessed more than once, strike out the assessment that is improper or illegal;
>
> (f) change the classification of all or part of the property that is the subject of the appeal; and
>
> (g) correct any clerical errors made by the assessor in the assessment roll."

The Regional Court also has certain additional powers set out in Section 91(1) of The Assessment Act which reads as follows:

> "The court may, of its own motion,
>
> (a) add to the roll any property that has been omitted therefrom with the value thereof as determined by it and the name of the person to

whom it should be assessed; and

(b) increase the amount of the valuation of any property."

Appeals to this Board from the Regional Assessment Appeal Court are provided for in Section 99 of the Assessment Act which reads as follows:

> "Any person aggrieved by a decision of the Assessment Appeal Court, including the clerk on behalf of the town or municipality and the Director, may appeal therefrom to the Nova Scotia Municipal Board."

Under Section 101(1) on appeal to this Board, the Board is obliged to inquire into the matter de novo and under Section 101(2) the Board "shall have all the powers of the Regional Assessment Appeal Court".

Counsel for the Appellant argues that the Board's power to determine questions of law pursuant to Section 32(2) of the Municipal Board Act is not a final determination because an appeal from the Board's order "upon any question as to its jurisdiction or upon any question of law" lies to the Appeal Division of the Supreme Court under Section 35(1) of the Municipal Board Act with leave of a Judge of that Court. This then distinguishes the facts of this case from the facts in the Ontario case of Toronto v. Olympia Edward Recreation Club [1955] 3 D.L.R., 641 where the Supreme Court of Canada in the majority decision held that it is beyond the power of the provincial legislature in Ontario to vest in a provincially appointed or designated assessment tribunal jurisdiction to determine conclusively or finally the assessability of property to municipal taxation. In Ontario, jurisdiction of this kind was vested prior to Confederation in Superior Courts and conforms broadly to the type of jurisdiction exercisable only by judges appointed under Section 96 of the B.N.A. Act.

Estey J., in the Toronto Olympia case [1955] 3 D.L.R. at pages 659 and 660 makes the following observations concerning the work of the assessor:

> "While the work of an assessor is largely administrative, he must, of necessity, make judicial as well as administrative decisions. The nature and character of his work and its importance in relation to the financing of a municipality make it desirable that there should be, at least with respect to the major portion of his duties, a summary and expeditious appeal available to the taxpayer. The Legislature, in appreciation of such, has set up these tribunals and given to them, as it appears, by virtue of the provisions of ss 69 to 83 inclusive of the Assessment Act, such jurisdiction and authority as it has deemed appropriate and within its legislative competence. When, however, there is, as here, an important question of law involving the liability of the taxpayer, which prior to and since Confederation has never been within the jurisdiction of these tribunals, it must be decided by a Court presided over by a Judge appointed under s. 96 of the B.N.A. Act."

In the Toronto Olympia case the original assessment was appealed by the property owner to the Court of Revision under the Assessment Act of Ontario which reduced the assessment and the City appealed to a Judge of the County Court who dismissed the appeal. From this decision the City appealed to the Ontario Municipal Board (O.M.B.) which dismissed the appeal on the ground that the only question involved was whether the bowling alleys in the subject building were liable to assessment or exempt therefrom.

The O.M.B. dismissed the appeal because of the lack of jurisdiction based on the decision of the Ontario Court of Appeal in Quance v. Ivey & Sons [1950] 3 D.L.R. 656.

The City's appeal to the Court of Appeal was dismissed because that Court found that the O.M.B. was without jurisdiction and the Court of Appeal was also without jurisdiction.

In Nova Scotia the appeal process provided under the Assessment Act is first of all to the Regional Assessment Appeal Court, then to this Board (formerly to the County Court) and then to the Appeal Division of the Supreme Court. This is different from the Ontario situation in the Toronto v. Olympia case where an appeal from the County Court to the O.M.B. was available.

Counsel for the Director submits that an assessor in order to carry out his duties under the Assessment Act must of necessity:

> "determine what property is assessable, and include that on the assessment roll. This is similar to the assessor's determination of what is a leasehold improvement, the breakdown between building and equipment, etc. No one disputes the authority of, indeed, the necessity for the assessor to make such determinations.
>
> Secondly, it is necessary for the Director of Assessment to review the assessor's determination under Section 84 of the Act whenever an appeal to the Regional Assessment Appeal Court is filed. The Director may agree or disagree, and has the authority to alter the roll. Again, no one disputes the authority of the Director of Assessment to perform this function.
>
> Thirdly, it is necessary for the Regional

> Assessment Appeal Court, in order to hear any matter, to conclude that it has jurisdiction to do so. In order to determine value or classification of property, the Regional Court must conclude that the property is assessable. Likewise, the Nova Scotia Municipal Board.
>
> Although the Board does not address itself specifically to this issue in each and every case, nevertheless, the determination of this question of law is a necessary and integral part of the Board's administrative function in finalizing the roll and doing what the assessor should have done in this regard.
>
> In the subject case, no objection was raised by the Respondent to the jurisdiction of the assessor or the Director of Assessment or the Regional Assessment Appeal Court to determine the matter in question.
>
> Surely, if the assessor and the Director of Assessment can make this determination, so can the Municipal Board."

Counsel for the Respondent in his submission that the Board does not have jurisdiction to determine whether bowling lanes located in the subject property owned by the Respondent are assessable property and therefore taxable under the Assessment Act, correctly states that the Board is an administrative tribunal established under the provisions of the Municipal Board Act, S.N.S. 1981, c. 9 which is an act of the Legislature of the Province of Nova Scotia. He points out that the members of the Board are appointed by the Governor-in-Council and are paid by the Provincial Government. He points out that under Section 45 of the Municipal Board Act the Board is substituted for the County Court with respect to appeals under Section 99 of the Assessment Act by persons aggrieved by a decision of the Assessment Appeal Court. Prior to the 1981 enactment of the Municipal Board Act these appeals were to the County Court. He then submits that the issue before the Board is "whether or not property is taxable" and that "is a matter properly determined by a judge appointed pursuant to Section 96 of the British North America Act." Section 96 of the B.N.A. Act states that:

> "The Governor General shall appoint the Judges of the Superior, District and County Courts in each Province except those of the Courts of Probate in Nova Scotia and New Brunswick."

Counsel for the Respondent quoted from the decision of the late Chief Justice Laskin in Tomko v N.S. Labour Relations Board et al (1976) 14 N.S.R. (2d) 191 at Page 199 respecting Section 96 of the B.N.A. Act as follows:

> "Section 96 of the British North America Act in terms and appointing power...is now regarded as a limitation not only on Provincial power to provide for the appointment of Judges of the status of those mentioned in section 96 but also on their power to invest agencies of their creation and members thereof appointed under their authority with jurisdiction or powers that (to use the formula adopted by the Privy Council and by this Court in a succession of cases) are broadly conformable or analogous to jurisdiction or powers exercised and exercisable by Courts which are within Section 96. In my opinion, the judgment of the Privy Council in Labour Relations Board of Saskatchewan v. John East Iron Works Ltd., [1949] A.C. 134 and of this Court in Tremblay v. Commission des Relations de Travail du Quebec, [1967] S.C.R. 697 have properly emphasized what other cases have reflected in their consideration of the force of Section 96 ...namely, that it is not the detached jurisdiction or power alone that is to be considered but rather its setting in the institutional arrangements in which it appears and is exercisable under the Provincial Legislation. I think that this is particularly true where remedial authority, such as that involved in the present case, is concerned."

Counsel for the Respondent referred the Board to the decision of Jones, J.A. of the Appeal Division of the Nova Scotia Supreme Court in Burke v. Arab (1982) 49 N.S.R. 2nd 181 where Jones, J.A., at page 194 made reference to In Re: Residential Tenancy Act of Ontario (1981) 37 N.R. 158, a decision of the Supreme Court of Canada as follows:

> "The essential issue was whether the broad scheme conferring judicial powers on the Commission was in conflict with the judicial power set out in Section 96 of the British North America Act. The court then expounded on the tests to be applied in determining that issue, as follows at p. 16.
>
> > 'The jurisprudence since John East leads one to conclude that the test must now be formulated in three steps. The first involves consideration, in the light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The question here is whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county court at the time of Confederation.'
>
> Dickson, J., stated at p. 17:
>
> > Step two involves consideration of the function within its institutional setting to determine whether the function itself is different when viewed in that setting. In particular, can the function still be considered to be a "judicial" function? In addressing the issue, it is important to keep in mind the further statement by Rand, J., in Dupont v. Inglis that '...it is the subject matter rather than the apparatus of adjudication that is determinative'. Thus the question of whether any particular function is "judicial" is not to be determined simply on the basis of procedural trappings. The primary issue is the nature of the question which the tribunal is called upon to decide.
>
> And further, at p. 18:
>
> > On the other hand, if the power or jurisdiction is exercised in a judicial manner, then it becomes necessary to proceed to the third and final step in the analysis and review the tribunal's function as a whole in order to appraise the impugned function in its entire institutional context. The phrase - "it is not the detached jurisdiction or power alone that is to be considered but rather its setting

> in the institutional arrangements in which it appears" - is the central core of the judgment in Tomko."

Counsel for the Respondent also referred to the decision of the Ontario Court of Appeal in "Quance v. Thomas A. Ivey & Sons Ltd. [1950] 3 D.L.R. (3rd) 656, the headnote of which reads in part as follows:

> "The Ontario Municipal Board has no jurisdiction to consider the question whether property is liable to or exempt from municipal assessment. Jurisdiction in determining that question as distinguished from the question of the amount of the assessment was vested in the Superior Courts of the Province both prior to and at the time of Confederation and cannot now be determined by a tribunal whose members are not federally appointed and paid as provided by ss. 96, 99 and 100 of the B.N.A. Act."

Counsel for the Respondent cites the Toronto v. Olympia case as authority for the proposition that it is beyond the power of a provincial legislature to vest in a provincially appointed or designated assessment tribunal jurisdiction to determine conclusively or finally the assessability of property for Municipal taxation. In the Toronto v. Olympia case previously referred to in this decision it was apparent that in Ontario there were tribunals sitting in appeal from an assessor in existence prior to Confederation but, as stated by Estey, J. at p. 656, "a question of law such as that here submitted could be finally decided only in the Courts of Law of that period; that under the B.N.A. Act, while these tribunals may be competently created by the Legislature, questions of law such as that here considered can only be determined by a Court presided over by a Judge appointed under s. 96 of the B.N.A. Act and, therefore, the above mentioned tribunals, including the Court of Appeal sitting in appeal under the provisions of the Assessment Act, could not finally determine such a question."

In the Toronto v. Olympia case reference is made to the case of Labour Relations Bd. (Sask.) v. John East Iron Works [1948] 4 D.L.R. 673 a decision of the Judicial Committee of the Privy Council, the headnote of which reads in part as follows:

> "In considering whether a provincial tribunal in its constitution and functions violates ss. 96-100 of the B.N.A. Act, it is necessary to inquire whether the tribunal exercises judicial power and, if so, whether in that exercise it is a tribunal analogous to a Superior, District or County Court. It is not only Courts which are designated "Superior" or "District" or "County" Court that are within the ambit of those sections, but not all tribunals which exercise judicial power are within their ambit. Thus, a provincial board may be validly established for administrative purposes and yet be unconstitutionally clothed with a judicial power; and again, a provincial Board may exercise judicial power without being such a Court as is specified in s. 96 or analogous thereto. Pertinent to the issue whether a tribunal is or is not analogous to a Court within s. 96 is the question whether the jurisdiction conferred upon the tribunal broadly conforms to the type of jurisdiction exercised by the Superior, District or County Courts."

It is the opinion of this Board that it does exercise judicial power through the necessity of carrying out its functions under the Municipal Board Act and the Assessment Act but in exercising that judicial power does not do so in a manner analogous to a Superior or County Court. It is clear that the Board under the provisions of Section 32(2) of the Municipal Board Act is given "authority" to hear and determine all questions of law or of fact "with respect to all matters within its jurisdiction". Thus the Board in acting as a tribunal to hear appeals relating to assessments arising from decisions made by Regional Assessment Appeal Courts must obviously exercise its authority under

Section 32(2) in determining questions of law and fact and in so doing may be exercising a form of judicial power. The Board's decisions on matters of law are, of course, not final or binding since the Municipal Board Act in Section 35(1) makes provision for an appeal to the Appeal Division of the Supreme Court of Nova Scotia "from any order of the Board upon any question as to its jurisdiction or upon any question of law," but application must be made to a Judge of the Appeal Division for leave to appeal. Decisions of the Board may also be reviewed by a Supreme Court Judge in certain circumstances by means of an application by way of certiorari.

It would appear that an assessor in carrying out his duties must of necessity make determinations as to what property is assessable and what is not and enter these properties on the assessment roll. He also, of course, must determine classifications set out in the Assessment Act for various properties. These determinations by the local assessor may be altered by the Director of Assessment under Section 84 of the Assessment Act after an appeal has been filed.

On an appeal to the Regional Assessment Appeal Court that Court must be able to determine its jurisdiction to hear the appeal and it must be able to determine whether property is or is not assessable in order to determine its value and classification for assessment purposes. This Board on an appeal to it from the decision of a Regional Assessment Appeal Court must be able to determine as a matter of law whether property is assessable as a necessary part of the Board's administrative function in finalizing the assessment roll and ensuring that the proper assessment and classification of properties is achieved.

It is the opinion of the Board that the exercise of a judicial power to determine questions of assessability of property in order to finalize the assessment roll is a proper exercise of that power incidental to carrying out its mandate under the Assessment Act. The Supreme Court of Canada in Attorney General of Quebec v. Farrah [1978] 2 S.C.R., 638 supports this view.

In Public Service Commission of Halifax v. East Hants, County of, and Director of Assessment (1979), 33 N.S.R. (2d) the jurisdiction of the Regional Assessment Appeal Court to determine who was an "occupier" under the provisions of the Assessment Act was challenged on the basis of the decision in the Toronto v. Olympia case. The Appeal Division of the Supreme Court of Nova Scotia after reviewing the relevant case law decided that the Regional Assessment Appeal Court did have jurisdiction.

It would appear that the laws of Nova Scotia prior to Confederation were different from the laws of Ontario and therefore the Toronto v. Olympia decision, while it establishes the law in Ontario, may not be binding in Nova Scotia. Prior to Confederation questions of assessability and of exemption in Ontario were matters clearly within the jurisdiction of judges of the superior courts. Beamish Murdoch in Vol. 1 of his work entitled, "Epitome of the Laws of Nova Scotia" published in 1832 sets forth the assessment procedure and practice. Grand juries in each county at the supreme court or county sessions determined the sums necessary to be raised for municipal purposes. Two collectors of county rates and three assessors were appointed in each township by the grand jury and the sessions of the county. The sessions apportioned the sum required on each township and settlement. An appeal procedure to Justices of the Peace was available. In this regard Murdoch states at page 135 of Vol. 1 that "By act of 1817, 57, G. 3. c. 10. v. 3. p. 10, the justices are empowered to hold sessions if necessary on 8 day's notice, to hear appeals from the rates, and decide on their merits".

Prior to Confederation the statute laws of Nova Scotia made provisions for assessment appeals to non-Section 96 tribunals. Under R.S.N.S. (1st) 1851, c. 46 s. 24 any person aggrieved by the assessment or levy could appeal to the next sessions held in the county and the court of appeal, "without prejudice to the whole or any part of the assessment," could set aside or lower the rate of such person or finally determine the appeal as they saw fit.

His Honor Judge O'Hearn, Judge of the County Court for District Number One in the Dartmouth Yacht Club v. City of Dartmouth case 32 N.S.R. (2d) 285 addressed the question as to whether the jurisprudence respecting assessment appeals in Ontario and Alberta necessarily applies to Nova Scotia. Judge O'Hearn makes these comments at page 302:

> "In both jurisdictions there is a non-Section 96 tribunal inserted in the hierarchy of assessment appeal bodies between the county and district judge and the Court of Appeal, and in both cases the appeal is to the county or district judge rather than to the court. This led Kellock, Estey and Cartwright, J.J., in Toronto v. Olympia, supra to take it for granted that all of these tribunals, including the county judge and the Ontario Court of Appeal, were personae designatae, not exercising their ordinary functions but limited powers and jurisdiction. That, in fact, was the basic question in Toronto v. Olympia.

> In Nova Scotia, the appeal is given by s. 99 to the county court, and that appears to have been the case from a very early date. In the strict sense, there was, of course, no county court before 1874 c. 18, but the Court of General Sessions exercised similar functions well before Confederation. That court lost its criminal jurisdiction (except in Halifax) in the reform year of 1841, but it functioned as the body for county government until the coming into force of 1879, Chapter 1, even after county government had been introduced on a municipal plan by or before R.S.N.S. IV (1874) c.57.

Judge O'Hearn at p. 305 raises an interesting question which unfortunately he did not fully answer. He states:

> "One further question is of some interest. Does the jurisprudence on the pre-Confederation powers of a Superior, county or district court in Upper Canada necessarily determine what the character of those courts must be in other provinces and in Nova Scotia, in particular?"

It is noteworthy that the late Chief Justice of Canada, Bora Laskin, when he was a Professor of Law at the University of Toronto, wrote an article published in 33 Canadian Bar Review 993 in which he commented on the Toronto v. Olympia case. In that article he made reference to the case of Dartmouth v. R.C. Episcopal Corp. of Halifax [1940] 2 D.L.R. 309 and quoted Graham, J. at p. 319 as stating:

> "The fact is that assessors are administrative officers and the Tax Appeal Court an administrative tribunal administering the Assessment Act and not a court exercising judicial power," then stated at p. 1015 of his article the following:
>
> "In short, although the Nova Scotia court did not specifically advert to the question under discussion, there is, in my view, no inconsistency in holding that assessment tribunals are not Section 96 courts, even though they pass on questions of assessability and exemption, and yet admitting that superior courts may have a reviewing authority on decisions made on such questions."

Finally, it is the Board's opinion that in order to determine valuation or classification of property or whether a person has been wrongfully inserted in or omitted from the assessment roll, the Regional Assessment Appeal Court and also this Board must have the power to determine whether property is assessable. The determination of this question is therefore a necessary and integral part of the Board's administrative function in finalizing the assessment roll. Section 35(1) of the Municipal Board Act provides for an appeal on a question of law to the Appeal Division of the Supreme Court of Nova Scotia, a court comprising judges appointed under Section 96 of the B.N.A. Act.

The Board therefore assumes jurisdiction and will hear the appeal on the merits at a time, date and place agreeable to the parties and the Board.

The Board makes no award as to costs.

DATED at HALIFAX in the County of Halifax and Province of Nova Scotia this 14th day of May A.D. 1984.

E R Lawrence

Nancy A Wilson

Members of the Nova Scotia
Municipal Board.

Director of Assessment v. Oxford Frozen Foods Ltd.

ASSESSMENT--COMMERCIAL--BULK FREEZER UNITS--MACHINERY AND EQUIPMENT TAX REBATE PROGRAM--WHETHER SHOULD BE ASSESSED AS MACHINERY, EQUIPMENT, ETC. OR AS BUILDING OR STRUCTURE--ASSESSMENT ACT, Ss. 1(a)(v),(vi), 2

This is an appeal by the Director of Assessment from a decision of the Regional Assessment Appeal Court, Cumberland Region which determined that bulk freezer units located in the Oxford Frozen Food Ltd. plant in the Town of Oxford were assessable as commercial equipment under s. 1(a)(vi) of the Assessment Act rather than as part of the building under s. 1(a)(v) of that Act. A result of holding that the bulk freezer units are assessable under s. 1(a)(vi) is that Oxford Frozen Foods would be entitled to a rebate of municipal taxes paid with respect to them under the Machinery and Equipment Tax Rebate Program of the Province. The freezer units in question were located in a specially designed room connected to the rest of the plant, with insulated walls and vapour barriers and heating under the floors. The freezing units take up 44,000 sq. ft. of a total plant area of 72,292 sq. ft. The plant, including the bulk freezing units, looks in the assessor's opinion like one "very large building".

HELD - The Board allows the appeal. The Appellant is entitled to its costs on a party and party basis on the County Court scale.

To be assessable under s. 1(a)(vi), the bulk freezer units must:

(1) come within the meaning of one of the following - "machinery, equipment, appliances, storage tanks, working tanks, or other things, including the supporting foundations and footings" and

(2) form an integral part of an operational unit designed for or used in processing or manufacturing.

The Board accepts that freezing constitutes processing for the preservation of food products and that freezing includes the storage of the frozen product. The Board accepts that the bulk freezer units were designed in conjunction with the company's production line and are an integral part of the operational unit. The bulk freezer units meet the requirement of forming an integral part of an operational unit designed for or used in processing. However, the bulk freezer units cannot be described as "machinery, equipment, appliances, working tanks, storage tanks or other things". The phrase "other things" should be restricted to "other things" similar to "machinery, equipment, appliances, storage tanks or working tanks". Bulk freezer units constructed in part of concrete floors and walls and ceilings with insulation and vapour barriers do not have similar characteristics to the items listed. The term which best describes the bulk freezer unit is a "structure", which term appears in s. 1(a)(v). It was not the intention of the legislature to include in s. 1(a)(vi) by way of the phrase "other things" a structure already specifically included in s. 1(a)(v). Also, following Riverport Seafoods Ltd. v. Dir. of Assessment, if the bulk freezer units are "equipment" or "other things", they are not mobile but part of the building in which they are located and should be assessable under s. 1(a)(v).

NOTE: Application by Oxford Frozen Foods Limited for leave to appeal was denied by the Appeal Division of the Supreme Court of Nova Scotia. (See Supreme Court File No. S.C.A. 011345).

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, Chapter 14 as amended;

- and -

IN THE MATTER OF: An appeal by the Director of Assessment from the decision of the Regional Assessment Appeal Court, Cumberland Assessment Region, respecting the assessment of the commercial property of Oxford Frozen Foods Limited, located in the Town of Oxford.

BEFORE: D.W. WILSON, C.A., LL.B.

COUNSEL: MARIAN F.H. TYSON, LL.B. for the Director of Assessment, Appellant.

ROBERT G. GRANT, LL.B., for Oxford Frozen Foods Ltd., Respondent

DECISION

By Notice of Appeal dated July 27, 1983, the Appellant, the Director of Assessment, appealed the decision of the Regional Assessment Appeal Court, Cumberland Assessment Region, dated July 12, 1983, which determined that bulk freezer units located in the Oxford Frozen Food Ltd. plant in the Town of Oxford, County of Cumberland, were assessable under Section 1(a)(vi) of the Assessment Act, R.S.N.S. 1967, c.14.

The Grounds of Appeal set forth in the Appellant's Notice of Appeal are:

> "1. That the Regional Assessment Appeal Court erred in finding that the bulk freezer units are assessable as commercial equipment under section 1(a)(vi) of the Assessment Act;
>
> 2. That the Regional Assessment Appeal Court erred in not finding that the freezer rooms are part of the building and therefore assessable under section 1(a)(v) of the Assessment Act;
>
> 3. Such other grounds as may appear from the evidence."

Sub-sections 1(a)(v) and 1(a)(vi) of the Assessment Act read as follows:

> "1(a) "assessable property" means:
>
> (v) buildings and structures erected or placed upon, in, over, under or affixed to land."
>
> (vi) machinery, equipment, appliances, storage and working tanks, and other things, including the supporting foundations and footings, that form an integral part of an operational unit designed for or used in processing or manufacturing except that where different lines of production equipment are used in a food processing operation for processing perishable crops at different times in the year, then only the machinery, equipment, appliances, storage and working tanks, and other things used in the line or lines that are in use for the greatest part of the production;"

The significance of the appropriate sub-section under which the bulk freezer units are assessable is a result of the establishment of the Machinery and Equipment Tax Rebate Program by the Department of Development, Province of Nova Scotia. A copy of a letter from the Honourable Roland J. Thornhill, Minister of Development for the Province of Nova Scotia to "All Nova Scotia Manufacturers and Processors", which was introduced as Exhibit 0-15, describes this program. It reads in part as follows:

> "Re: Machinery and Equipment Tax Rebate Program
>
> As you may know, the government of Nova Scotia has recently established a new program to rebate municipal taxes paid on the first $1 million of assessment for manufacturing and processing machinery and equipment. This program, which I announced on December 7, 1979 will become effective with respect to 1980 taxes. Its principal effect will be to assist small to medium size businesses, providing complete relief for 96 percent of firms now assessed for this type of taxation and partial relief for the remainder."

Prior to the appeal of its 1983 business occupancy assessment, the Respondent was assessed in the amount of $350,000.00 for commercial equipment pursuant to Section 1(a)(vi) and it received a rebate of municipal taxes paid with respect to this assessment under the above-mentioned program. The Respondent will be eligible for an additional rebate of municipal taxes if the bulk freezer units are assessable under Sub-section 1(a)(vi) of the Act and not under Sub-section 1(a)(v) as claimed by the Appellant.

The hearing of the appeal took place in the Council Chamber of the Town of Oxford on October 31, 1983. Briefs were filed with the Board subsequent to the conclusion of the hearing with the last brief received by the Board on November 25, 1983.

Evidence at the hearing was given by Mr. Joseph C. Trefry NSIA, on behalf of the Appellant and by John Bragg, George Krug, Dr. Eric D. Jackson and Corey Sigut on behalf of the Respondent.

Oxford Frozen Foods Ltd. is engaged primarily in the business of producing and processing wild blueberries. It specializes in selling its products to institutions. According to its President, Mr. John Bragg, the company is the largest supplier of wild blueberries in Canada. The Company also processes, in smaller quantities, carrots, onion rings and strawberries. The company has increased its annual processing capacity from 2,000,000 pounds in 1968 to 26,000,000 pounds at the time of the hearing in 1983. To meet the increasing demand for its product, the production capacity of the plant was expanded several times and with each expansion, additional bulk freezer units were added. The plant presently operates six bulk freezer units.

Mr. Bragg said that although the various sections of the plant are interconnected; functionally, the plant is divided into three sections. The first section is the front end of the plant where the various produce is off-loaded from delivery trucks. Depending on the type of product, it is sorted, cleaned, blanched, peeled, cut, diced and in the case of onion rings, fried. The second section of the plant is the freezer section which contains heavy specialized equipment including conveyor belts and flow freeze units. It also contains the packing room. The third section of the plant contains the bulk freezer rooms or units.

According to Mr. Joseph C. Trefry, Senior Assessor for the Cumberland Region, the total area of the plant is 72,292 square feet, with 1,800 square feet used for office space, 26,492 square feet used for processing and packaging (Sections 1 and 2 described by Mr. Bragg) and 44,000 square feet used for bulk freezing.

Mr. Bragg said that once the product has been prepared for freezing in the front end of the plant, it is fast frozen by running the product through the flow freezer unit, sized, packaged in thirty pound cartons and then stored in the bulk freezer units on pallets until ready for shipment in refrigerator cartons to markets all over the world. Mr. Bragg stated that, on occasion, after the product has been run through the flow freezer units, it is stored in large bins in the bulk freezer units and processed at a later date. He said the bulk freezer units are designed to hold products at -10°F which enables processing at a later date. According to Mr. Bragg it is necessary to process some of the product at a later date because the supply of fresh products may be too great to process at one time. Also sales demand varies and it may be necessary to package some products to a specific size. Mr. Bragg said that the plant's operations are seasonal with total employment of 250 to 270 at peak periods. Mr. Bragg also said that on occasion it is necessary to put the frozen product back through the flow freezer units to improve the quality of the product.

According to Mr. Bragg, the purpose of freezing the product is to preserve it until the company can get the product to its customers. He said the bulk freezer units are an important part of the freezing operation and the company would not be able to operate without them.

Mr. George Krug has been employed since 1955 by St. Onge Ruff and Associates Limited of York, Pennsylvania, U.S.A. as an engineer specializing in the design of refrigeration systems. He has been a registered professional engineer in the province of Nova Scotia for the last ten years. He was involved partly in the design of the original Oxford Frozen Foods Limited plant in 1968. He was the designer and project manager of two expansions to the plant since 1968.

According to Mr. Krug, there is a direct relationship between the level of processing and the bulk freezer units. He said the Respondent would be restricted in its production capacity if it did not have the bulk freezer units. Mr. Krug stated that the flow freeze units are designed to freeze the product quickly. When the product comes out of the flow freezer it is not completely frozen to the core. It is packaged and placed in cartons which are put on pallets in the bulk freezer units. The bulk freezer units are designed to lower the temperature of the product to -10°F to maintain the quality of the product. According to Mr. Krug it may take a week before the -10°F temperature at the core is reached in the bulk freezer units.

Mr. Krug said that the design theory of bulk freezer units is known as "envelop construction". The bulk freezer units are designed so that everything is included in the unit and there are no penetrations which would conduct heat or moisture into the unit. The units have vapor barriers in the walls, ceiling and floor to stop vapor from coming in through the unit. Mr. Krug said that it is extremely important to ensure that the wall/roof juncture and wall/floor juncture are sealed tightly. There is a special type of insulation in the walls, ceiling and floor of the unit to prevent the infiltration of heat into the freezer units. The area underneath the floor slab must be kept above freezing temperature to prevent the formation of ice which would lead to a heaving of the floor of the bulk freezer units causing damage to the floor. This area is heated by a grid network of under floor plastic pipe through which glycol is pumped. The only entrance to the unit is by way of an electrically operated door which is specifically designed for the unit with 4" of urethane insulation and a heated perimeter to prevent freezing. The refrigeration power is supplied to the bulk freezer units by the same compressor which supplies power to the flow freezer units.

In Mr. Krug's opinion, the bulk freezer units are not like a distribution centre but are an integral part of the operational unit. According to Mr. Krug, there would not be a need for a compressor to supply refrigeration power to the bulk freezer units if the units were just used for storage.

On cross-examination, Mr. Krug said that the bulk freezer units are special purpose units which are attached to the building.

Mr. Corey Sigut, who resides in Amherst, is a professional engineer. He has been employed by the Respondent since his graduation from the Nova Scotia Technical College in 1974. His responsibilities include the supervision of construction of all plant facilities, acting as the company's liaison with outside firms which enter into contracts to do design work for the Respondent, ensuring the quality control of the company's product, and supervision of repairs to the Respondent's plant and equipment.

According to Mr. Sigut, there is a difference in the maintenance requirements for the bulk freezer units and other parts of the building. Mr. Sigut said that close attention has to be given to the special features of the bulk freezer room such as monitoring the refrigeration, defrosting the freezer coils, inspecting the insulation, watching for rust buildup, maintaining the floor warming system, the electrical doors and air circulation system. He said other parts of the building structure do not require such close attention.

Mr. Sigut stated that the company is required to test the level of micro-organisms in their product in accordance with government regulations. It takes approximately five days for a micro-organism test. Mr. Sigut said that on occasion the micro-organism level in the product is higher than the government requirements or client requirements and by holding the product in the bulk freezer unit, the micro-organism level in the product is reduced.

Mr. Sigut said that the bulk freezer units are sometimes used for the initial freezing of the product. They are also used to hold products which have been run through the flow freeze units but are required to be resized and re-packaged to customer specifications.

In Mr. Sigut's opinion, the flow freeze tunnels, compressor, electrical connectors and piping which are presently assessable under Sub-section 1(a)(vi) of the Assessment Act are not mobile because the plant would have to be shut down in order to move the equipment and there would be a great deal of difficulty in removing the equipment.

Dr. Eric D. Jackson is employed by Agricultural Canada at its Research Branch, Kentville, Nova Scotia as a Research Scientist and Senior Food Microbiologist, in the food process and storage section. He obtained his Doctor of Philosophy degree in 1974 from the University of Waterloo with particular emphasis on the improved analytical method in Microbiology and Fungicide Evaluation. His professional experience includes teaching and research in food microbiology and food science and consulting to the food industry. He has written several articles and reports on various aspects on food preservation. Dr. Jackson prepared a report entitled "Statement on the Microbiology of Food Preservation by Freezing" which was filed as Exhibit 0-10. In his statement, Dr. Jackson said that "food preservation is the term used to indicate prevention or delay of microbial and chemical deterioration." He further stated "food spoilage is caused by the growth of micro-organisms which may be agumented by chemical reactions, catalyzed by enzymes, between atmospheric oxygen and certain food components." According to Dr. Jackson, the methods used in food preservation fall into main categories:

(1) those that deliberately reduce or completely eliminate microbial contamination in food enzymes, e.g., heat processing and irradiation.

(2) those that do not delibertely kill micro-organisms or destroy enzymes but which simply slow down or stop their activities.

Freezing is considered a food preservation method which falls under the second category. Dr. Jackson also stated:

> " The principle of food preservation by freezing is that as temperatures are decreased, chemical reactions which are an intregal part of the metabolic processes of all living cells, progressively slow down. It follows that microbial growth and multiplication will also be inhibited at low temperatures."

He further stated that "once warm conditions are restored, microbial growth will resume."

According to Dr. Jackson, freeze preservation of food is not simply the act of freezing but includes subsequent and continuous maintenance of the frozen state right up to the point of cooking and consumption. Dr. Jackson also said that a side effect of freezing products is the destruction of some of the microbes.

Mr. Joseph C. Trefry, NSIA, is employed by the Department of Municipal Affairs as a Senior Assessor in the Cumberland Assessment Region. He prepared the assessment of the Respondent's property for the 1983 assessment year. He assessed the bulk freezer units as "buildings placed upon or affixed to land" pursuan to Sub-section 1(a)(v) to the Act. In the opinion of Mr. Trefry, the bulk freezer units look like a building or structure and not like machinery or equipment used in processing. Mr. Trefry described the plant as he saw it. The total plant including the freezer units is built on a concrete frost wall which supports the exterior walls of the plant. The height of the building in which the bulk freezer units are located is similar to the height of the processing section of the building. All exterior walls of the building are clad with a metal siding, entrance to the bulk freezer units is through a door at one end of the processing area of the plant. There are no entrances to the bulk freezer units from outside the plant. In Mr. Trefry's opinion, the Respondent's processing plant including the bulk freezer units looks like one "very large building". According to Mr. Trefry, the only way to move the bulk freezer units would be to dissect it. In his opinion, the purpose of the bulk freezer units is the storage of the Respondent's product. In his opinion the special features in the units such as the heat underneath the floor and the special insulation are a necessary feature of cold storage buildings and do not make the units "equipment". On cross-examination, Mr. Trefry said that when he first assessed the bulk freezer units as "building" he was not aware of the various functions of the bulk freezer units such as initial freezing of a certain part of the product, storage of the product for later processing and processing in the freezer units at a microbiological level.

R.C. Tait, Q.C., Vice-Chairman of the Regional Assessment Appeal Court, Cumberland Assessment Region, agreed with the Respondent that the bulk freezer unit should be assessed pursuant to Section 1(a)(vi) of the Assessment Act. In his Decision, which was filed as Exhibit 0-2 he states:

> " It was argued by the Appellant that it was not necessary to apply the test of mobility or fixedness set out in the Riverport Seafoods case to the present case as it would only serve to resurrect the law of fixtures which, as the Appeal Court notes, was eliminated in the amendments to the Assessment Act in 1977. Also, since there was no evidence of the role of bulk freezer units in the processing of frozen foods in the Riverport case, the Court

> was not required to consider the meaning of the second portion of Sec.1(a)(vi) which provides a principal argument in the case at bar, that of being actively involved in the processing of frozen food, forming an integral part of the operational unit. I accept the Appellant's argument in this regard and agree that the facts are different in the present case. Here we are not merely talking about equipment that is fixed, or forms part of a building, but in my opinion, from its description, we are faced with the equipment actually forming what appears at first to the eye to be a building. The Riverport case distinguishes between building and equipment whereas in the present case what is thought at first to be a building because of its similarity in design to a building, becomes by its very structural make-up and purpose, equipment. Here we are not talking about a structure that equipment was affixed to, but rather a structure that was formed out of the equipment. It is important to determine what the designers were building. It was not a building but a bulk freezer for the purpose of food processing. The confusing part comes when you look at it, since it has most of the characteristics of a building. However, if one took the normal domestic home freezer and multiplied its dimensions several hundred times what would result would be a "thing" that looked a lct like a building.
>
> I find therefore that the bulk freezer unit should be assessed as commercial equipment pursuant to Section 1(a)(vi) of the Assessment Act."

Counsel for the Appellant argued that the bulk freezer units are properly assessable "as part of the building" pursuant to Section 1(a)(v) of the Act. It is the submission of Counsel for the Appellant that the Respondent's plant is a special purpose building and the bulk freezer units are special purpose sections of the building. According to Counsel for the Appellant the special features of the bulk freezer units are necessary to serve their intended functions of preserving and storing frozen fcod and add to the usefulness of the plant as a frozen food building. According to the Counsel for the Appellant, the bulk freezer units are no more than an expensive warehouse and are similar to freezer storage facilities whose purpose is to preserve and store product until it is sold.

Counsel for the Appellant also argues that Section 1(a)(vi) was intended to cover equipment which is not part of the building. According to Counsel for the Appellant if equipment is attached to a building, then it is no longer equipment pursuant to Section 1(a)(vi). Counsel for the Appellant further argues that the bulk freezer units do not fit under Section 1(a)(vi) because they are not any of the enumerated items listed in the first part of that sub-section, that is, machinery, equipment, appliances, storage and working tanks, and other things; are not used for processing or manufacturing; and are not an intregal part of an operational unit.

Counsel for the Appellant submits that the bulk freezer units do not fall within the phrase "other things". It is the submission of Counsel for the Appellant that when a general phrase such as"and other things" appears after a list of specific items, the general phrase should be restricted to items similar to those enumerated immediately prior to the general phrase.Counsel for the Appellant therefore argues that the bulk freezer units are a building and not like the enumerated items such as machinery, equipment, appliances and storage and working tanks.

Counsel for the Appellant also argues that the bulk freezer units do not process food because their purpose is "to preserve and store food and not to effect any change or alter the state of the food".

Also Counsel for the Appellant argues that a reduction of micro-organisms as a result of the freezing in the bulk freezer units is only incidential to the function of the units to preserve and store food and does not make the bulk freezer units an integral part of a processing unit pursuant to Sub-section 1(a)(vi).

Counsel for the Appellant also argues that when "assessable property" is assessable pursuant to more than one category in Section 1 of the Act, the assessable property must be placed in the most applicable category and assessed under the section which more appropriately describes it. In other words, even if the bulk freezer units are assessable under Sub-sections 1(a)(v) and 1(a)(vi) they should be assessed under Sub-section 1(a)(v) because this sub-section more appropriately describes the units.

Counsel for the Respondent argues that the bulk freezer units should be assessable pursuant to Section 1(a)(vi) of the Act.

The current definition of "assessable property" was introduced by an Act to Amend the Assessment Act, S.N.S. 1977, c.22. Prior to this amendment, all real and personal property (subject to certain exceptions) was liable to taxation - the Assessment Act R.S.N.S. 1967 c.14 Section 2.

According to Counsel for the Respondent, the current definition of"assessable property" discards the reliance upon the common law relating to "fixtures" and puts forth a new definition of "assessable property" which is broken down into a number of classifications which cut across traditional common law definitions of real property, fixtures and personal property. Counsel for the Respondent states at Page 10 of his post-hearing brief "indeed, while Section 1(a)(v) would certainly apply to items traditionally viewed as fixtures Section 1(a)(vi) would equally apply to some items traditionally viewed as fixtures."

Counsel for the Respondent argued that Sub-section 1(a)(v) is a broadly drafted section of general application. He states at Page 11 of his post-hearing brief "this section is so pervasive in its scope, that it must be conceded that a bulk freezer unit constitutes 'a structure erected or placed upon ----- land'".

However, Counsel for the Respondent further argues that the introductory part of Sub-section 1(a)(vi) - "machinery, equipment, appliances, storage and working tanks, and other things, including the supporting foundations and footings" - has a wide scope as well. He argues that the scope of listed items are capable of wide interpretation. He referred to the broad definition of "machinery" contained in Webster's new International Dictionary (Second Edition 1948) which was quoted with approval by Mr. Justice Wallace of the British Columbia Supreme Court in Cominco Ltd. v. Assessor of Trail 19 MBLR 207:

> " The means and appliance by which anything is kept in action or a desired result is obtained."

He also referred to the definition of "equipment" found in Black's Law Dictionary (5th Edition 1979).

> " Furnishings, or outfit for the required purpose. Whatever is needed in equipping...."

Counsel for the Respondent further submits that by including the phrase "other things, including the supporting foundations and footings", the legislature intended that the introductory part of Sub-section 1(a)(vi) should have a wide scope. He further argues that by adding the phrase "including the supporting foundations and footings" the legislature intended to include in Sub-section 1(a)(vi) items which may have been traditionally viewed as fixtures. Also Counsel for the Respondent submits that the use of the noun "things" indicates an intention that the introductory part of Sub-section 1(a)(vi) should have a wide scope. Counsel for the Respondent referred to the definition of "things" in Black's Law Dictionary (Supra):

> " The object of dominion or property as contradistinguished from 'person'".

Black's Law Dictionary also contains the following explanation of "things":

> " Such permanent objects, not being persons, as are sensible, or perceptible through the senses. Things are distributed into three kinds:
>
> (1) things real or immovable, comprehending lands, tenements, or hereditaments;
> (2) things personal or movable, comprehending goods and chattels; and
> (3) things mixed partaking of the characteristics of the two former, as a title-deed, a term for years."

According to Counsel for the Respondent, this definition of "things" is so broad it would include everything under Sub-section 1(a)(v) of the Act.

Counsel for the Respondent further argues that while the introductory part of Sub-section 1(a)(vi) is broad in its scope, it is restricted by the modifying clause contained in the second part of the sub-section - "that form an integral part of an operational unit designed for or used in processing or manufacturing." As a result, Counsel for the Respondent submits that Sub-section 1(a)(vi) becomes a narrowly defined specific clause.

Counsel for the Respondent thus argues that in the event that the bulk freezer units are assessable under Sub-section 1(a)(v) and 1(a)(vi), the particular sub-section 1(a)(vi) should apply rather than the general sub-section 1(a)(v) "in accordance with the well established canon of statutory interpretation that the particular displaces the general."

Counsel for the Respondent states at Page 15 of his post hearing brief that the bulk freezer units were shown to form an "integral part of the operational units designed for or used in processing or manufacturing" in the following ways:

> (i) The aim of all food processing is the extended preservation of food. Food spoilage is mainly caused by the growth of micro-organism. The process of preserving food by way of freezing operates either by destroying micro-organisms or by preventing or delaying their activity. The preservation of foods in this manner is not simply the act of freezing but also includes subsequent and continuous maintenance of the frozen state. The storing of frozen food under circumstances such as those found in the bulk freezer units forms an integral part of the processing of the food.
>
> (ii) The bulk freezer units are used not only for storing already frozen produce but also used for the first time freezing of a significant portion of the produce being produced. Oxford

> Frozen Foods' most important product, blueberries, has a very short life expectancy without being processed. As a result, frequently, the Company places raw wild blueberries in large bins in the bulk freezer units for preliminary freezing so that blueberries are preserved until such time as they may be run through the portion of the plant in which the blueberries are cleaned and sorted and placed in more managable sized packages. All strawberries processed at the plant are frozen in this fashion.
>
> (iii) The bulk freezer units receive refrigeration power from the same compressor providing refrigeration power to the freezer tunnels. The direct connection of these pieces of equipment serves to underline the fact that they are part of an integrated operational unit designed in the processing of frozen foods.
>
> (iv) The bulk freezer units are required to complete the freezing of the produce and equilibrate the temperature of the produce completely through.
>
> (v) The bulk freezer units are required to maintain a quality control for the frozen food processed. It is necessary to have a bulk freezer unit capacity in order to complete microbe tests and ensure that acceptable levels of bacteria are present in the frozen produce. In addition, bulk freezer units may be used to reduce microbe levels to acceptable levels.
>
> (vi) It is demonstrated by the simultaneous expansions of the flow freezer capacity and bulk freezer unit capacity at the Oxford Frozen Foods Limited plant, that it would be impossible to operate the flow freezer tunnels without a complimentary bulk freezer unit."

Counsel for the Respondent also argues that the preservation of food by freezing constitutes"processing". He referred to the following definition of "process" which is found in the Living Webster Dictionary of the English Language:

> "Process: n. a succession of actions undertaking to bring about some desired result.
> Process, v.t. to treat or prepare by some particular process; to convert, as an agricultural commodity, into marketable form by some special treatment."

Counsel for the Respondent submits that a comparison of a frozen product with an unfrozen product after a period of time such as eleven months should indicate that some processing has been done to the frozen product which remains fit for human consumption while the unfrozen product is not fit for human consumption. Counsel for the Respondent further says that processing occurs in the bulk freezer units in the following ways:

(1) the product is frozen further after leaving the flow freeze units;

(2) the product is tested for microbe levels after the product has been run through the flow freezers;

(3) the bulk freezer units are needed in the event of a breakdown of the flow freezers;

(4) the processing plant could not be operated without the bulk freezer units to facilitate the delivery of the product.

In order for the bulk freezer units to be assessable under Sub-section 1(a)(vi) they must meet the requirements set out in that Sub-section, namely:

(1) come within the meaning of one of the following - "machinery, equipment, appliances, storage tanks, working tanks, or other things, including the supporting foundations and footings" and

(2) form an integral part of an operational unit designed for or used in processing or manufacturing.

The Board accepts the evidence of Dr. Jackson that freezing constitutes processing for the preservation of food products and the freezing process includes not only the quick freezing of the product but the storage of the frozen product in the bulk freezer units up to the point of sale and delivery. The Board also accepts the evidence of Mr. Krug that the bulk freezer units were designed and constructed in conjunction with the design and construction of the company's production line and therefore are an intregal part of the operational unit. The Board also accepts the evidence of Mr. Krug that the bulk freezer units were designed for the freezing of food products and the preservation of the frozen state until disposal by the Respondent. In the opinion of the Board, the bulk freezer units form an integral part of the operational unit designed for or used in processing.

However, in the opinion of the Board the bulk freezer units cannot be described as "machinery, equipment, appliances, working tanks, storage tanks or other things." The Board does not accept the argument of Counsel for the Respondent that the phrase "other things" as it appears in Sub-section 1(a)(vi) is capable of the wide interpretation he suggests. In the opinion of the Board, if the intention of the legislature in drafting this sub-section was that everything "that forms an integral part of an operational unit designed for or used in processing" was assessable pursuant to this sub-section, it would have said so and would not have listed several items followed by the phrase "and other things". In the opinion of the Board, the phrase "other things" should be restricted to "other things" similar to "machinery, equipment, appliances, storage tanks or working tanks". In the opinion of the Board, the bulk freezer units, which are constructed in part of concrete floors, walls and ceilings with insulation and vapor barriers in the walls and ceilings, do not have similar characteristics to the items listed in the introductory part of Sub-section 1(a)(vi). Also the term which best describes the bulk freezer unit is a "structure" which already appears in Sub-section 1(a)(v). In the opinion of the Board it was not the intention of the legislature to include in Sub-section 1(a)(vi) by way of the phrase "other things" a structure which is already specifically included in Sub-section 1(a)(v).

Both Counsel referred the Board to the case of Riverport Seafoods Limited v. Director of Assessment (1981) 44 NSR 2d 281. This is a decision of the Appeal Division of the Supreme Court of Nova Scotia concerned in part with Sub-sections 1(a)(v) and 1(a)(vi) of the Assessment Act. Speaking for the Court at Page 287, Mr. Justice Hart stated:

> "Since the freezing equipment was valued by the assessor separately from the buildings forming the respondent's plant, and since part of that equipment is incorporated in the buildings and should be considered a part thereof, (it would appear therefore that) some of the value of the equipment should be included under s.1(a)(v) when determining the value of the buildings and some of the value should be included under s.1(a)(vi) as machinery equipment, etc., that form an integral part of the processing or manufacturing unit. It would also appear that to the extent that the equipment does not form a part of the building or structure, it may be exempt from business occupancy assessment under s.7(1)(b).
>
> Prior to the amendments to the Assessment Act in 1977, property subject to taxation was

> referred to as real or personal property. When it was necessary to determine whether a particular item was part of the real or personal property, the law as to fixtures as it had been developed by the courts over the years was of assistance. Now, however, the Act refers only to assessable property and no reference has been made to fixtures in the definition section. It is therefore necessary for an assessor to include part of what may have previously been a fixture in determining the value of buildings and structures under para. 1(a)(v) and another part under 1(a)(vi) when valuing the manufacturing equipment. This was not done here where the assessor separated the "fixed equipment" and gave an independant valuation.
>
> In my opinion Mr. Lennon (the tax payer's expert appraiser) has done what the assessor should have done and has classified a certain amount of the fixed equipment as forming part of the building or structure in which it is located with the remainder being classified on the basis of its mobility as machinery, equipment, etc., under s.1(a)(vi."

The Court in the Riverport Seafoods Limited case was dealing with fixed equipment which the assessor had assessed pursuant to Sub-section 1(a)(vi). In the opinion of the Board, the Court considered the question of whether some of this fixed equipment (which was otherwise assessable pursuant to Sub-section 1(a)(vi)) should be assessable pursuant to Sub-section 1(a)(v) and concluded that the assessor should classify a certain amount of the fixed equipment as forming part of the building or structure in which it is located with the remainder being classified on the basis of it's mobility as "machinery, equipment, etc." under Sub-section 1(a)(vi). In the opinion of the Board, the same reasoning would apply if the Court was considering any of the remaining items, other than "equipment" listed in the introductory part of Sub-section 1(a)(vi).

Assuming the bulk freezer units are "equipment" or "other things" that form an integral part of an operational unit designed for or used in processing, in the opinion of the Board, if they formed part of the building in which they were located, they should be assessable pursuant to Sub-section 1(a)(v).

There is no doubt that the bulk freezer units are permanently attached to the rest of the building. The evidence of Mr. Bragg was that the various sections of the plant are functionally separate but physically interconnected. Entrance to the bulk freezer units is by way of an inside door from the processing area of the plant. In fact, the units themselves physically resemble a room in a building. The units are constructed in part of floors, walls and ceilings with insulation and vapor barriers in the walls and ceilings and are permanently affixed to the outside or supporting walls of the plant which enclose them. The bulk freezer units are not mobile.

The assessor has already assessed part of the freezing equipment such as the flow freezers, compressor, electrical connectors, and piping as "equipment, etc." pursuant to Sub-section 1(a)(vi). Each of these items have varying degrees of fixedness to the building but all are removeable and capable of being used elsewhere.

In the opinion of the Board, the bulk freezer units are a structure or a part of the building with a special use and not part of the equipment in the building.

Assuming the bulk freezer units are "equipment " or "other things", in the opinion of the Board, the assessor has done what the Supreme Court in the Riverport case, supra, said should be done and classified a certain amount of the fixed equipment as forming part of the building or structure in which it is located with the remainder being classified on the basis of its mobility as "equipment, etc." under Sub-section 1(a)(vi).

The Board therefore allows the appeal and determines that the bulk freezer units located in the Respondent's plant in the Town of Oxford, County of Cumberland, are assessable as part of the building in which they are located pursuant to Sub-section 1(a)(v) of the Assessment Act.

The Appellant shall be entitled to its costs on a party and party basis on the County Court scale to be taxed by Maurice D. Bent, LL.B., of Amherst, N.S.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 17th day of July, A.D., 1984.

DARRYL W. WILSON

Lawrence Van Tassell v. Director of Assessment

ASSESSMENT--CHANGE IN USE--FACTORS TO CONSIDER--WHETHER VENDOR OR PURCHASER RESPONSIBLE--FACTORS TO CONSIDER--VALUATION--ASSESSMENT ACT, Ss. 1(eb), 40A(6), 40B(1),(6),(7)--MUNICIPAL BOARD ACT, S. 22(1)

This is an appeal from a decision of the Regional Assessment Appeal Court, Colchester Region holding the Appellant liable for a change in use tax. The land in question, lot #2-83 containing 1.874 ac., was subdivided from 180 acres owned by the Appellant, as an addition to lot #1-81. It has since been sold to Mrs. S., the owner of lot #1-81. The 180 ac. were assessed as "forest resource exempt". Subsection 40B(6) of the Assessment Act provides that when "forest property, or any part of it, ceases to be land bona fide used or intended to be used for forestry purposes, ... a change of use tax equal to twenty per centum of the value, ... shall become due and payable...."

HELD - The appeal is dismissed. There will be no order as to costs.

The issues to be determined by the Board are: (1) whether the subject property has ceased to be used for forestry purposes and if so when, (2) whether the vendor or purchaser should be liable for the change in use tax, and (3) the determination of value. The Board concludes that the forestry use of the property ceased on the date it was actually transferred. Although the Appellant claimed he did not use the 180 acres for forestry purposes, it has been so assessed since 1978 and he has never appealed that assessment. The intended use of the subject property was no longer for forestry purposes when subdivision approval was granted for it "as an addition to lot #1-81 only". Lot #1-81 is a residential cottage lot immediately adjacent and not assessed as forest property exempt. Considerable argument was directed to whether the vendor or purchaser of lot #2-83 was responsible for the tax. The words of s. 40B(7) imply that the "assessed owner of the land thereof formerly subject to this Section" should be liable for payment of the change in use tax except if the use is changed by purchaser. The onus is on the Appellant to prove that the change in use was made by the purchaser. The principal factors to be considered in determining whether the property had ceased to be used for forestry purposes are: (1) the creation of a lot by subdivision approval; (2) the size of the lot created, and (3) the purchase price of the lot. Who instigated the application for subdivision approval and who determined the size and price become relevant in determining whether the vendor or purchaser was responsible for the tax. The purchase agreement with the present owner's son-in-law indicates both knew the reason for the purchase was to acquire a lot capable of approval for building purposes. Such a lot is one "intended to be used for residential ... purposes" and so not forest property within the meaning of s. 1(eb). The Appellant, the intended purchaser and the actual purchaser share responsibility for the initiation of the application for subdivision approval. The purchase price of lot #2-83 was so much higher per acre than that for a 41 ac. woodlot sold by the Appellant in the same year ($1,334/ac. versus $183/ac.) that it is reasonable to conclude that the sale price was intended to be on a residential or cottage lot scale. The Board concludes the purchase price was primarily set by the Appellant and that it is an indication that he knowingly sold the lot not for forest property use but as a residential cottage lot. Also, the subdivision regulations of the municipality specify that the minimum size for "lots to be used for woodlot purposes" is 5 ac. The Appellant intended that the subject property cease to be used for forestry purposes. He is liable for the change in use tax. The value of the land at that time was the purchase price - $2,500.00.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14 R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by Lawrence Van Tassell from a decision of the Regional Assessment Appeal Court, Colchester Assessment Region, dated December 21, 1983, concerning the liability for Change in Use Tax due for Lot #2-83, Lands of the the Appellant, at Shortts Lake, Colchester County.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, Vice-Chairman

COUNSEL: DAVID W. GRUCHY, Q.C., and
GUY DESMARAIS, Articled Clerk,
for the Appellant

MARIAN F.H. TYSON, LL.B., for
the Director of Assessment

DECISION

The Appellant, Lawrence Van Tassell, filed a Notice of Appeal dated January 4, 1984, which was received by the Board, January 12, 1984, from a decision of the Regional Assessment Appeal Court, Colchester Assessment Region, dated December 21, 1983, whereby the Appellant, Lawrence Van Tassell, was held liable for a change in use tax pursuant to the provisions of Section 40B, Sub-sections 6 and 7 of the Assessment Act, R.S.N.S., 1967, Ch.14, as amended.

The appeal was heard February 20, 1984, in the Council Chambers of the Municipality of the County of Colchester at Truro.

The purchaser and current owner of the subject property (Mrs. Ruth Schurman) was not represented or present at the hearing although Counsel for the Director informed the Board that Mrs. Schurman had been notified of the hearing. Both parties agreed that the appeal was properly before the Board and the Board proceeded to hear the appeal on the merits.

As stated in the Notice of Appeal (Exhibit L-1), the grounds of appeal are as follows:

> "1. That there has been no change in use of the lands in question as required by the provisions of Section 40B(6) of the Assessment Act, R.S.N.S., 1967, c.14, and that any assessment purportedly made pursuant to that section is null and void;
>
> 2. That in the alternative, if there was a change in use or intended use, the Appellant was not the owner of the lands at the time of such change and is not liable for such change in use, pursuant to the provisions of subsection (7) of said Section 40B;
>
> 3. That in the further alternative, if there ever was any intended change in use, such intention was frustrated and abandoned by both the Appellant and the purchaser of the property and the exemption pursuant to said Section 40B continues to apply."
>
> The Notice of Appeal further states that:
>
> " .....the Appellant will ask that the decision appealed from be reversed and that his name be struck from the roll for the assessment of the lands herein stated, that the classification of the lands herein stated be changed or that the assessment be transferred to the purchaser, Ruth Shurman."

The decision of the Regional Assessment Appeal Court was filed in evidence as Exhibit L-2. The appeal to that court was heard October 26, 1983. The Appellant was not present nor was he represented by Counsel at the hearing before the Regional Assessment Appeal Court.

The grounds of appeal to the Regional Assessment Appeal Court as set forth in the Regional Court's decision filed as Exhibit L-2 were the following:

> "1. that the Appellant is not the Owner of the subject lands;
>
> 2. that there has been no change of use of the subject lands;
>
> 3. if there has been any change in use, such change was made by the Purchaser;
>
> 4. if there has been any change of use, such change was not effected by the Appellant; and
>
> 5. that the value of the subject property for purposes of the assessment of the change of use tax is incorrect."

The findings of the Chairman of the Regional Assessment Appeal Court as set out in Exhibit L-2 were the following:

> "1. that at all times material hereto the Appellant was the assessed owner of the subject lands;
>
> 2. that there has been a change of use of the subject lands;
>
> 3. that the Appellant intended that the subject lands cease to be used for forestry purposes; and
>
> 4. that the value used by the Colchester Regional Assessment Office for the subject land, which is based upon its purchase price, is correct for purposes of the change of use assessment."

The property which is the subject of this appeal is Lot #2-83, as shown on a subdivision plan of lands of the Appellant located near Shortts Lake, 15 miles from Truro. Lot #2-83 containing 1.874 acres was subdivided from 180 acres owned by the Appellant and approved on June 24, 1983 as an addition only to the adjoining Lot #1-81 approved in 1981 and presently owned by Ruth Schurman. In 1983 the year in which the subject lot was approved, the Appellant's 180 acres of land, including the subject lot, was assessed as "forest resource exempt" pursuant to Section 40B of the Assessment Act.

The relevant sections of the Assessment Act concerning forest property taxation are the following:

> "40B (1) All forest property bona fide used or intended to be used for forestry purposes shall be exempt from taxation under this Act or any other public or private Act of the Legislature authorizing a tax on the assessed value of property, except as provided in this Section."
>
> "40B (6) In the event that the forest property, or any part of it, ceases to be land bona fide used or intended to be used for forestry purposes, this Section shall cease to apply and a change in use tax equal to twenty per centum of the value, determined by the assessor pursuant to Section 38, of the land or part thereof to which this Section ceased to apply, shall become due and payable to the town or municipality in which the land is situate, unless the land or part thereof becomes farm property to which Section 40A applies, in which case no change in use tax is payable."
>
> "40B (7) The change in use tax shall be payable by the assessed owner of the land or part thereof formerly subject to this Section when this Section ceases to apply, but if the use of the land or part thereof is changed by a purchaser of the land, then the purchaser shall be liable for the change in use tax."

Forest property is defined in the Act as follows:

> "1(eb) "forest property" means any lot of land, excluding any buildings or structures thereon, not used or intended to be used for residential or commercial or industrial purposes or any combination of such purposes;"

The phrase "intended to be used" is defined as follows:

"1(fa) "intended to be used" means a present intent supported by some substantial act to carry out the intent;"

Counsel for the Appellant called the assessor, Wayne Creelman, and the Appellant to give evidence. The assessor was also called to give evidence for the Director.

A report prepared by Mr. Creelman, the assessor of the subject property, was filed in evidence as Exhibit L-3. The report contains copies of applications for subdivision approval of two lots submitted to the Municipality of the County of Colchester and signed by Lawrence Van Tassell. The first application is dated August 12, 1981, and the second is dated May 31, 1983. According to the assessor, these applications are for the subdivision approval of Lots #1-81 and #2-83 respectively. The assessor gave evidence that to his knowledge, no application had been made for health approval for Lot #2-83, which was given subdivision approval June 24, 1983, "as addition to 1-81 only".

Mr. Creelman, the assessor, stated that his knowledge of the purchase price for Lot #2-83 came from the Affidavit of Value accompanying the deed from the Appellant to Ruth E. Schurman (a copy of this Affidavit is included in Exhibit L-3) and from a confirmation by telephone with the purchaser, Mrs. Ruth Schurman, the owner of Lot #1-81. Mrs. Schurman, he said, had stated that she had paid the survey costs of Lot #2-83 in addition to the purchase price of $2,500.00.

The assessor's report contains some comparative sale figures for four lots subdivided from the Van Tassell property:

Lot No.	Date Sold	Price	Purchaser
76-1	June 25, 1976	$1,800 (Residential)	Brian Smyth
1-81	Sept 14, 1981	$2,000 (Residential)	Mrs. R. Schurman
1-83	June 3, 1983	$7,500 (Woodland)	Brian Smyth
2-83	July 29, 1983	$2,500 (Addition to 1-81)	Mrs. R. Schurman

Lot #1-83 contains 41 acres, Lots #1-81 and #2-83 are 1.8 acres. According to Mr. Creelman, the price for the third listed sale Lot #1-83, indicates that the land sold was not intended for residential purposes, as the size of the parcel (41 acres) together with the price per acre ($183.00) is in line with the average price of woodland in Colchester County. Mr. Creelman believed that the price of Lots #1-81 and #2-83, each approximately two acres in size, indicates that the intended use of those parcels was residential. In addition, the assessor pointed out that the subdivision regulations for the Municipality of the County of Colchester (Exhibit L-5) providing for the approval of lots on private roads for woodlot or seasonal (cottage) purposes states in Section 25(3)(f):

> " Lots to be used for woodlot purposes shall have a minimum area of 5 acres and a minimum frontage of 200 feet;"

Mr. Creelman had concluded that the size of Lot #2-83, the price paid for it which was far in excess of the usual price per acre for woodland and the fact that Lot #2-83 was approved as an addition to an existing residential Lot (Lot #1-81) all indicated that a change in use had taken place and that the subject property had ceased to be "land bona fide used or intended to be used for forestry purposes". The assessed owner of Lot #2-83 therefore, in his opinion, was liable for change in use tax.

The assessor acknowledged that no change in use tax had been levied in 1981 when Lot #1-81 was subdivided and sold by Mr. Van Tassell to Mrs. Schurman, and that the assessment department was in error in failing to do so.

Mr. Creelman stated that he was unaware of a purchase agreement (Exhibit L-4) between Lawrence Van Tassell and Robert Hughes dated March 5, 1983, at the time when he assessed the subject property for change in use tax. He said that he had first seen the purchase agreement when Mr. Hughes had brought it into the assessment office a short time before the hearing of this appeal. Mr. Hughes stated at that time that he was Mrs. Schurman's son-in-law.

The purchase agreement (Exhibit L-4) between "Lawrence Van Tassell (vendor) of Brookfield and Robert Hughes (purchaser) of Truro" states:

> " I, Lawrence Vantassell to agree to the sale of the parcel of land located at Shortt's Lake for the agreed price of two thousand and five hundred dollars ($2,500.00) under the following conditions:
>
> 1. Mr. Hughes will be responsible for the arranging of and cost of the land survey (Agreed size: 200 Feet by 400 Feet).
>
> 2. The lot must be inspected and approved for building purposes before sale of same can be finalized.

> 3. Mr. Hughes is permitted access to the land for the purpose of clearing and preparing for inspection.
>
> 4. SHOULD THE LAND NOT BE APPROVED FOR SALE AS A BUILDING LOT, any upgrading of the land (i.e. Access Road, fallen trees) will be to the benefit of Mr. Vantassell's holdings, Mr. Hughes relinquishing all claims to said improvements to the lot."

It is signed by Mr. Van Tassell and Mr. Hughes, witnessed and dated March 5, 1983.

Mr. Creelman stated that he believed the purchase agreement applied to Lot #2-83, which eventually was not approved as a "building lot" but only as an addition to the existing lot, #1-81, owned by Mrs. Schurman.

In deciding that Mr. Van Tassell, the vendor of Lot #2-83, should be liable for change in use tax, the assessor stated that he had concluded that Mr. Van Tassell's intentions were to continue to own a 180-acre parcel of land assessed as forest property exempt but to subdivide a lot from that, not to be used for forest property but to be an addition to the Schurman residential lot.

The Appellant gave evidence that he had not intended to change the use of the Lot #2-83 by the purchase agreement and that the terms of the sale were the same to Mrs. Schurman as they would have been to Mr. Hughes. Mr. Van Tassell said that he had not made an application for approval of subdivision of Lot #2-83, that the signature on the application for subdivision in Exhibit L-3 was not his, that the approval made no difference to him and that he had paid none of the survey costs involved. Furthermore he stated that the remaining 180 acres in his ownership were not used as forestry property and that he had cut only one cord of stove-wood from it in the previous year. Under cross-examination, Mr. Van Tassell agreed that he had known that the Schurmans had wanted to build a cottage on Lot #1-81 and that Mr. Hughes had said that he wanted to buy the same size of lot as the Schurmans because that was the only size which would get approved as a building lot. Mr. Van Tassell did not deny that he may have authorized the application for subdivision approval of Lot #2-83.

The issues to be determined by the Board are these:

1. Whether the subject property has ceased to be used for forestry purposes and if so when?
2. If the subject property has ceased to be used for forestry purposes, whether vendor or purchaser should be liable for the change in use tax.
3. The determination of the value for purposes of calculating the change in use tax.

The Board concludes from the evidence adduced at the hearing that the forestry use of the subject property had ceased on July 29, 1983, the date of the actual transfer as shown on the Affidavit of Value forming part of Exhibit L-3. The 180 acres owned by the Appellant in 1983 from which the subject property was subdivided have been assessed as forest property exempt since 1978. In spite of the evidence of the Appellant that he did not use the property for forestry purposes, the exemption conferred by Section 40B of the Assessment Act was never appealed by him. The Appellant stated that he had cut a limited amount of wood from the property for his own use and had sold a 41-acre parcel in 1983 to be used as a woodlot. Prior to the subdivision approval of Lot #2-83 from the remaining 180 acres owned by the Appellant, no evidence was adduced to prove that the subject lot was used differently in any way from the balance of the lands of the Appellant, i.e., "land bone fide used or intended to be used for forestry purposes".

In the opinion of the Board, the intended use of the subject property was no longer for forestry purposes when subdivision approval was granted, June 24, 1984, for Lot #2-83 "as an addition to Lot #1-81 only". Lot #1-81 is a residential cottage lot immediately adjacent to Lot #2-83, on the west side of Shortts Lake West Road. Lot #1-81 to which Lot #2-83 was added is not assessed as forest property exempt.

The Board heard considerable argument on the issue of whether the vendor or purchaser was responsible for the change of use of the subject property, Lot #2-83. Section 40B(7) of the Assessment Act states:

> " The change in use tax shall be payable by the assessed owner of the land or part thereof formerly subject to this Section when this Section ceases to apply, but if the use of the land or part thereof is changed by a purchaser of the land, then the purchaser shall be liable for the change in use tax."

The words of this Section imply that the "assessed owner of the land or part thereof formerly subject to this Section" should be liable for payment of the change in use tax except if the use is changed by the purchaser. The presumption in

Section 7 is that a change in use tax is payable by the assessed owner of the land who formerly benefitted from the partial exemption from taxation, unless the use is changed by the purchaser. The onus then is on the Appellant to prove that the change in use of the subject property was made by the purchaser and therefore the liability for the change in use should fall on the purchaser.

The principle factors to be considered in determining whether the subject property had ceased to be used for forestry purposes are: (1) the creation of a lot by subdivision approval; (2) the size of the lot created and (3) the purchase price of the lot. Whether vendor or purchaser instigated the application for subdivision approval, and who determined the size and price of the lot become relevant in determining whether the Appellant or the purchaser was responsible for the change in use.

The purchase agreement (Exhibit L-4) between the Appellant and Robert Hughes states as one of the conditions of sale that "the lot must be inspected and approved for building purposes before sale of the same can be finalized," and further that "should the land not be approved as a building lot, any upgrading of the land.....will be to the benefit of Mr. Van Tassell's holdings". It is clear from the wording of this agreement that both vendor and purchaser knew that the reason for the purchase was to acquire a lot capable of approval for building purposes. The Assessment Act defines forest property in Section 1(eb) as "any lot of land, excluding any buildings or structures thereon, not used or intended to be used for residential or commercial or industrial purposes or any consideration of such purposes" and "intended to be used" is defined as "a present intent supported by some substantial act to carry out the intent". In the context of these definitions, a lot of land such as Lot #2-83 being sold on the condition that it is approved for building purposes is a lot "intended to be used for residential....purposes". The entering into the agreement of purchase and sale is an indication of an intent to change the use of the subject lot and that intent is supported by the act of application for subdivision approval subsequent to the agreement of purchase (Exhibit L-4).

The Board assumes that the purchase agreement between Mr. Van Tassell and Mr. Hughes was an agreement between a willing buyer and a willing seller. Both vendor and purchaser understood that the purchaser's intention was to acquire a lot which could be used "for building purposes". The subject lot was not approved as a single building lot and Mr. Hughes did not complete the purchase of the lot. The Appellant eventually sold the subject lot to Mrs. Ruth Schurman (Mr. Hughes' mother-in-law) on the same terms as he had agreed to sell to Mr. Hughes, even though the Appellant stated that he understood that Mr. Hughes had been unsuccessful in getting approval for the lot to enable it to be used as a building lot. The Board concludes from the evidence that the Appellant and intended purchaser (Hughes) and the actual purchaser (Schurman) share responsibility for the initiation of an application for subdivision approval pursuant to the purchase agreement, Exhibit L-4.

The subject lot is approximately 200' wide and 400' deep and contains 1.874 acres. It is virtually identical to the adjacent Lot #1-81 which contains 1.837 acres. The purchase price for the subject lot was $2,500.00 or $1,334.00 per acre with the purchaser accepting the costs of surveying the lot. In contrast to this price per acre, the Appellant sold a 41 acre parcel of land in the same year for a total price of $7,500.00 or $183.00 per acre.

The Appellant stated that he did not know Mr. Hughes or the two witnesses to the purchase agreement who accompanied him and that Mr. Hughes initiated the purchase by asking Mr. Van Tassell if he could buy a lot the same size as Mrs. Schurman's (Lot #1-81). Approached in this way, presumably the Appellant was in a position to have a considerable input into the eventual agreed price. The Board accepts the evidence of the assessor that the price paid for the 41 acre woodlot sold by the Appellant in the same year as the subject lot was in line with the current price per acre in the Municipality for forest property at that time. The price paid for Lot #2-83 is so much higher per acre that the Board feels it is reasonable to conclude that the sale price was intended to be on a residential or cottage lot scale rather than the scale for forest property.

No evidence was led that the Appellant had advertised cottage lots for sale and therefore the Board concludes that the agreed price was primarily set by the vendor and set on a residential scale. The lot price, in the opinion of the Board, is an indication that the vendor (the Appellant) knowingly sold Lot #2-83 not for forest property use but for use as a residential cottage lot. On the matter of lot price, which is some indication of intended use of the subject property and therefore of an intention that it would cease to be used for forestry purposes, the Board concludes that the Appellant was primarily responsible.

The Board heard evidence that 5 acres is the required minimum size for "lots to be used for woodlot purposes" specified by the subdivision regulations of the Municipality of the County of Colchester. From the evidence, it appears that the main determinant of the size of Lot #2-83 was the purchaser's belief that 200 feet by 400 feet (approximately 1.8 acres) was the "only size that would be approved", i.e., for a building lot, as specified in the purchase agreement. Had the vendor wanted to avoid liability for change in use tax, he could have arranged for the subdivision and sale of a 5 acre or larger parcel of land from his 180 acre parcel and had it approved as a woodlot rather than as a building lot or as an addition to a building lot so that on transfer the lot would still retain its exemption as land used for forestry purposes.

The Board concludes that the vendor (the Appellant) was responsible for the subdivision of land and the sale of a lot which qualified as an addition to an approved residential lot but did not meet the minimum size requirements for a woodlot and that therefore the Appellant intended that the subject property cease to be used for forestry purposes. Furthermore, the price of the lot which was appropriate for a residential cottage lot but excessive for woodland further substantiates the opinion of the Board that the vendor, Mr. Van Tassell, intended that the forestry use of Lot #2-83 would cease on its transfer and that therefore, he should be liable for a change in use tax.

The Board finds some guidance in this case from the decision of MacDonald, J.A. on behalf of the Appeal Division of the Supreme Court of Nova Scotia in the Green Meadows Estates Ltd. case (S.C.A. #01256) in which his Lordship stated that "Section 40(6) of the Assessment Act does not specify that the change in use tax shall be based on a new use of the property. The Section simply says in effect that if farm property ceases to be used for agricultural purposes it is no longer exempt from taxation and a change in use tax is payable. What triggers the change in use tax therefore is not a new use of the land but rather the cessation of an existing use".

Although the Green Meadows case involves a cessation of an agricultural use under Sub-section (6) of Section 40A, the same reasoning would apply to Sub-section (6) of Section 40B involving the cessation of a forestry property use. The Board notes that Sub-section (6) of Section 40B is broader in its scope than Sub-section (6) of Section 40A in that Sub-section (6) of Section 40B not only triggers a change in use tax in the situation where forest property "ceases to be land bona fide used" for forestry purposes but also where the forest property ceases to be land ".....intended to be used for forestry purposes". (emphasis added). Under Sub-section (6) of Section 40A the change in use tax is triggered after the actual cessation of land being used for agricultural purposes whereas under Sub-section (6) of Section 40B the change in use tax may be triggered either on the actual cessation of use or where an intention to cease using land for forestry purposes is shown.

The Board in the instant case is of the opinion that when Mr. Van Tassell entered into the agreement of sale with Mr. Hughes (March 5, 1983) there was some indication on his part that the subject lot would cease to be used for forestry purposes and this intention was strengthened at the date (June 24, 1983) of the approval of the Municipality of the subject lot as an addition only to the adjoining Lot #1-81 owned by Mrs. Schurman but it was not until the actual transfer of the subject lot to Mrs. Schurman took place that the forestry use actually ceased. At that time the agreement of sale between Mr. Van Tassell and Mr. Hughes had been aborted because of the failure to have the lot approved as a building lot. Also Mr. Van Tassell was not under a legal obligation to sell or convey the subject lot to Mrs. Schurman as an addition to her lot. Therefore, when Mr. Van Tassell actually transferred the subject lot to Mrs. Schurman on July 29, 1983, the forestry use of the lot ceased.

The Board therefore finds as a fact that there has been a cessation of the forestry use of the subject lot which took place on July 29, 1983, the date of the actual transfer of the lot from Mr. Van Tassell to Mrs. Ruth Schurman.

The Board further finds that the Appellant as vendor and assessed owner of the subject lot at the time of the transfer is the person liable for a change in use tax.

The Board also determines that the value of the subject property as of the date of the cessation of the forestry use is the sum of $2,500.00 representing the purchase price of the property as shown by the Affidavit of Value for deed transfer tax purposes sworn to on July 29, 1983, the date of the cessation of forestry use and also the date of transfer.

The Board in the exercise of its discretion under Sub-section (1) of Section 22 of the Municipal Board Act makes no award as to costs.

The Board dismisses the appeal and an Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 23rd day of July, A.D., 1984.

RH Blois

R.H. BLOIS, Chairman

E Lawrence

ELIZABETH LAWRENCE
Vice-Chairman

Members of the Municipal Board

Hume v. Director of Assessment

ASSESSMENT--RESIDENTIAL--MARKET VALUE--ASSESSMENT RELATIVE TO NEIGHBOURS ASSESSMENT CONSIDERED--ASSESSMENT ACT, Ss. 38, 72(2)

This is an appeal from a decision of the Regional Assessment Appeal Court, Hants Region confirming the 1984 assessment of the Appellant's residential property at $44,250.00. The Appellant's position was that his assessment was "too high when comparison is made to other very similar southerly adjoining or neighbouring properties". The Appellant had in each of 1981, 1982 and 1983 appealed his assessments to the Regional Assessment Appeal Court, which confirmed those assessments at $42,900, $42,900, and $41,100 respectively. A thorough inspection of his property had been made by a different assessor in 1978 and that assessment ($30,800) was maintained for 1978, 1979 and 1980. The increase in the Appellant's assessment in 1981 was 39.29% whereas the two properties south of the Appellant's increased 24.8% and 19.40%. In 1984 the Appellant's assessment increased 7.6% whereas the two neighbours increased 20% and 16.6%. Prior to the appraisal report done for the present appeal, the assessor had not personally inspected the Appellant's property except for one visit in 1982 or 1983 when no one was at home and he walked around the exterior.

HELD--The appeal is dismissed. Costs were not sought and so no costs will be awarded.

The Board confirms the 1984 assessment. Unfortunately the Appellant was not able to provide the Board with any substantial or credible evidence to support his contention that his property was over valued for assessment purposes. The Board agrees with the Appellant that "property evaluation is not an exact science" and that another assessor or real estate appraiser may have come to a different conclusion. The Board has not viewed the subject property and is not prepared to substitute its opinion for that of the trained and qualified assessor. The Appellant's evidence that two neighbours were under assessed in relation to him was weak. Even if he had shown neighbouring properties were under assessed this would not have been sufficient evidence for the Board to reduce his assessment. He could have appealed the neighbours' assessments. The Board accepts the evidence of the assessor that $44,250 is the market value of the subject property in accordance with s. 38 of the Assessment Act.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S., 1967, As amended;

- and -

IN THE MATTER OF: An Appeal by C.B. Hume from the decision of the Regional Assessment Appeal Court, Hants County Assessment Region made May 24, 1984;

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: The Appellant, C.B. HUME, was not represented by Counsel;

A.G. MACDONALD, Q.C., for the Municipality of East Hants;

MARIAN TYSON, LL.B, for the Director of Assessment.

DECISION

This is an appeal by C.B. HUME from the decision of David S. Fraser, Vice-Chairman of the Regional Assessment Appeal Court Hants County Region made May 24, 1984, by which the 1984 assessment in the amount of $44,250.00 of the Appellant's residential property consisting of a dwelling house, detached garage and land in the Village of Elmsdale, Hants County was confirmed.

The Appellant's Notice of Appeal is dated July 4, 1984, and was received by the Board on July 6, 1984. The hearing of the appeal took place in the Municipal County Chambers at Milford on August 27, 1984. No objection to the Board's jurisdiction to hear the appeal was made by

Counsel for the Municipality of East Hants or for the Director. The Board therefore proceeded to hear the appeal on the merits.

In a letter dated June 22, 1984, from the Appellant to the Director of Assessment for the East Hants Region, a copy of which was attached to the Appellant's Notice of Appeal, the Appellant stated that "I desire to appeal the above noted decision -- my objection to same being, as in the past, that the assessment on my Elmsdale property is too high when comparison is made with very similar neighbouring properties which condition stems from the re-assessment made for computing 1981 taxes and remains unchanged."

The only witnesses called to give evidence were Mr. Hume and Lloyd Matheson, the assessor who assessed the subject property for the 1984 assessment year.

The Appellant is a retired Manager of the National Gypsum Company at Milford and is a qualified Mining Engineer and Geologist who had appealed his assessment for each of the years 1981, 1982 and 1983 to the Regional Assessment Appeal Court. His property had been assessed in the amount of $42,900.00 for the 1981 assessment year and that assessment had been confirmed by the Regional Court. The 1982 assessment of $42,900.00 was also confirmed by the Regional Court in 1983. In October of 1982 the Appellant's property was inspected and the 1983 assessment was fixed at $41,100.00. This assessment was confirmed by the Regional Court in 1983.

The main evidence given by the Appellant was read from a hand-written script dated August 27, 1984, a copy of which was filed with the Board as Exhibit H-5. The Appellant stated that his appeal "does not stem from the fact that I consider the assessment on my Elmsdale property, per se, is too high in relation to its reasonable true market value (the reverse I know to be the case) but that the evaluation is too high when comparison is made to other very similar southerly adjoining or neighbouring properties."

Mr. Hume clearly makes the point that he does not "seek to have assessments on neighbouring properties raised. I do, however, want to feel reasonably content that I have been equitably treated." He also pointed out that he was aware "of the fact that property evaluation is not an exact science even though certain uniform criteria are generally followed".

The Appellant indicated that in 1978 an assessor came to his property and carried out a very detailed and thorough inspection spending about 1½ hours for that purpose. The Appellant understood that all properties in his municipality were carefully inspected in 1978 so as to bring "all properties into reasonable comparitive assessed value".

The Appellant's argument is that if all properties were properly assessed in 1978 that it would be a simple matter to establish the proper market values of properties for re-assessment purposes in 1981, 1982 and 1983 by:

> "1) Applying an across the board identical increase in assessments of such percent as to achieve the purpose of the exercise, be it 25, 40 or whatever percent was deemed necessary and reasonable.
>
> 2) Then, in the necessary instances, relatively few, where individual upgrading or downgrading had taken place within the previous three years, apply adjustments accordingly after the completion of the procedure outlined in (1) above."

Mr. Hume then pointed out that in 1981 his assessment had increased from $30,800.00 for each of the years 1978, 1979 and 1980 to $42,900.00 an increase of $12,100 or 39.29%, which he stated appeared reasonable. However, when he inquired at the Municipal Office he found that the two properties south of his property had increased assessments of 24.8 and

19.40 per cent thus giving him reason to appeal.

Mr. Hume filed with the Board as Exhibit H-6 a table showing the assessment valuations for his two neighbours and his own for the years 1978, 1979, 1980, 1981, 1982, 1983 and 1984. This table also shows the dollar increases in assessments for each property and the percentage increases. This table indicates that the Appellant's property assessment increased by a much greater percentage in 1981 from the 1980 assessment than either of his two neighbours (39.3% as against 24.8% and 19.4%). Mr. Hume's assessment for 1983 was reduced by $1,800.00 from the 1982 figure of $42,900.00 to $41,100.00, whereas his two neighbours retained the same assessments in 1983 as in 1982. In 1984 the Appellant's assessment was increased by $3,150.00 from $41,100.00 to $44,250.00 an increase of 7.6% a much smaller increase than the 20% and 16.6% increases experienced by his two neighbours.

The Appellant emphatically pointed out that his property suffers from an unstable ground condition "in that the easterly upper level portion of my property which has done sizeable damage to concrete walls, paving, brickwork, total destruction of an expensive 'backup' sewage system, paving pull-away from the east side of my residence and on all sides of the garage, caused considerable basement leakage etc."

The Appellant stated that the reshingling of his garage and dwelling is several years overdue as is inside and outside painting and exterior caulking. He stated that much of the brickwork on his house required repointing and his driveway requires re-surfacing. He also indicated that his chimney requires repairs and there are cracks in his foundation walls.

Mr. Hume pointed out that his property lies at the crest of a hill so that the road slopes in two directions at this point. Because of the crest in the road trucks coming to the crest in the road must shift gears which Mr. Hume states causes a serious noise disturbance.

The Appellant's house was built by the Appellant in 1955 and has been owned and occupied by him since that time.

In reply to a question from the Board the Appellant stated that in his opinion his assessment for 1984 should be $36,050.00.

Evidence on behalf of the Director was given by Lloyd L.C. Matheson, an assessor since 1978, who has resided at Nine Mile River for the past 22 years. He prepared the appraisal report relating to the subject property filed as Exhibit H-4. He was the person who assessed the Appellant's property at $44,250.00 for the 1984 assessment year. He did not assess the subject property in the years 1980, 1981, 1982 and 1983.

Prior to the 1984 assessment of the Appellant's property Mr. Matheson had not personally carried out a full inspection of the Appellant's property but had made one visit to the property sometime in 1982 or 1983 when no one was at home. He rang the doorbell and walked around the dwelling house. From the information he found on a card in the assessment office relating to the subject property and from his brief visit to the property Mr. Matheson determined the 1984 assessment in the amount of $44,250.00.

At the time of the appeal to the Regional Court Mr. Matheson carried out an inspection of the Appellant's property and discussed the property with the Appellant who informed him of the property's defects. The appraisal report prepared by Mr. Matheson was prepared for purposes of this hearing and was forwarded to the solicitor for the Director on August 16, 1984. A copy of this report was given to the Appellant by Counsel for the Director, prior to the hearing.

Mr. Matheson's report concludes with the statement that "It is the opinion of the undersigned that the actual cash value of the subject property as of January 1, 1983 is $44,250.00".

In his direct evidence Mr. Matheson stated that although he used the words "actual cash value" in his appraisal report he meant "market value". He made it clear that his figure of $44,250.00 represented the market value of the subject property as of January 1, 1983 in conformity with Section 38 of the Assessment Act. Unfortunately Mr. Matheson in his appraisal report in setting forth a definition of "Market Value" quoted the wording of Section 38 as that Section was worded in the Assessment Act, R.S.N.S. 1967, C. 14. The wording of Section 38 was changed by an amendment to the Assessment Act contained in Statutes of Nova Scotia 1981, C. 15. This amendment changed inter alia the words "actual cash value" to "market value".

The appraisal report indicates that the subject property is situate in the Village of Elmsdale, in the Municipality of East Hants on Route 214 approximately 30 miles from Halifax and the same distance from Truro.

The subject property is zoned Planned Residential (R) which restricts its use to single and multifamily dwellings.

The report states at page 6 that "a complete revaluation of all real property within the Province of Nova Scotia was carried out for 1981 bringing the level of assessment to an estimated 100 per cent of market value as of January 1, 1983."

The subject land is approximately 0.74 acres in size and has a frontage of 154.56 feet. The front portion of this lot is slightly above street level and the rear portion is much lower than the front. The property is serviced by municipal water and sewer facilities. The driveway is paved with asphalt.

The dwelling house is a one-storey building of frame construction with exterior walls of brick veneer and a concrete basement and is heated by an oil fired hot air furnace. The house contains two bedrooms, living room, dining room, kitchen, den and bath.

The appraisal report states that the "design and layout of the improvement conforms with today's standards, therefore, it is not felt necessary to make any adjustments for incurable or curable functional obsolescence." Under the hearing of "Economic Obsolescence" the report states that "There is no degrading influence present and, as a result, no allowance for economic obsolescence is felt necessary." The appraiser estimates that the life of this dwelling is 100 years plus and although the chronological age is 28 years he estimates the effective age to be 35 and the remaining life to be 65 years.

The assessor arrived at his estimate of the market value of $44,500.00 for the subject property after carrying out a market data approach to value by analysing four comparable sales of properties and after carrying out a cost approach analysis.

Of the four comparables used by the assessor, two are situate in Elmsdale, and two are in the Village of Lantz. Three of the comparables were sold in 1982 and one in 1981. The assessor prepared a table showing the sale price of each of the four comparables and the adjustments made by the assessor to arrive at his estimate of the various adjusted sales prices which ranged from a low of $39,600.00 for comparable sale No. 4 to a high of $50,500.00 for comparable sale No. 3. It is noteworthy that the assessor did not make any adjustment for time "due to the small volume of sales in the area".

With regard to the market data approach the assessor's conclusions state that "all sales were adjusted so as to be fair comparison to the subject property. The adjusted estimates range from $39,600.00 to $50,500.00. The assessed value of the subject property is $44,200.00 which is within the range of adjusted sales".

In determining the value of the subject property using the cost approach, the assessor placed the subject dwelling in the category of a class 3B property which he explained is a house in "good condition". The assessor then used the Nova Scotia Provincial Assessment Manual as a guide in determining the replacement cost of the subject dwelling and garage. He updated costs shown in the Manual prepared in 1976 by the use of a costing index supplied by Boeckh. By this process Mr. Matheson arrived at an estimated replacement cost of the dwelling house for 1983 in the amount of $51,377.00 and an estimated replacement cost for the garage in the amount of $4,080.00. He applied depreciation at the rate of30% to the house based on his opinion that the house is in good condition and is between 24 - 30 years old. His figure of 30% is taken from the Normal Depreciation Guideline Table in the Nova Scotia Residential Assessment Manual.

The assessor applied a 5% reduction to the cost of the dwelling based on the fact that "single glazed windows are a cause of heat loss and wooden gutters are out of style, hard to repair and require a great deal of maintenance."

After applying a 25% rate of depreciation to the 1983 replacement cost of the garage he arrived at a figure of $3,060.00 as the estimated replacement cost of the garage less depreciation. His estimated replacement cost of the dwelling less depreciation amounts to $34,166.00 and his estimate of the value of the land is $7,000.00. Adding these last three figures the assessor arrived at $44,226.00 as the estimated value of the subject property by the cost approach. He then rounded this figure to $44,250.00.

In estimating the land value to be $7,000.00 the assessor regarded the subject lot which is approximately three-quarters of an acre to have the same value as a half acre lot because the rear portion of the subject lot is low land which could be affected by the flood plain of the area. He stated that all lots up to a half acre in size are assessed at $7,000.00. He indicated that residential lots in this area are not assessed on the basis of foot frontage but on area. Extra value is given to lots in excess of half an acre. On pages 17 and 18 of his report Mr. Matheson lists the sale price of four lots, two in Elmsdale, one in Lantz and one in the Enfield area. These four lots all of comparitive size to the subject land, sold for prices varying from $7,000.00 to $7,600.00 with the average price approximately $7,200.00. The assessor did not consider any need to make adjustments in the sale price of these lots. He therefore concluded that a lot value of $7,000.00 for the subject property was appropriate.

On cross-examination Mr. Matheson indicated that he took into account and made allowance for the cracks in the foundation of the dwelling and the subsidence problem of the subject lot by virtue of the 30% depreciation allowance. He stated that because of these factors he placed the dwelling in the rating category of "Good" and this category when coupled with the age of the dwelling calls for a 30% depreciation rate under the provisions of the Nova Scotia Assessment Manual. The Manual defines "Good" as "minor deterioration visible; attractive, desirable and useful". The next higher rating is "Very Good" and is defined by the Manual as "slight evidence of deterioration; quite attractive and desirable". The next lower rating is "Average" which is defined as "normal wear and tear apparent, average attractiveness and desirability".

In his argument following the presentation of the evidence the Appellant emphasized that prior to the 1984 assessment of his property the assessor had not made a detailed inspection of the property but had only carried out a 10-minute walk around the exterior of the subject dwelling. He also argued that the assessor had given too little consideration to the unstable ground condition which exists at the subject property and which he stated is the cause of some physical deterioration of the subject dwelling.

Counsel for the Municipality argued that the present assessment for 1984 is supported by a complete assessment study prepared by Mr. Matheson which supports the 1984 assessment placed on the Appellant's property.

Counsel for the Director argued that there was no evidence that the uniformity provision of Section 38 of the Assessment Act was not complied with. She stated that the object of the hearing is to determine the proper assessment value to be placed on the Appellant's property and that expert evidence of value was given by Mr. Matheson, the assessor, which should be accepted by the Board rather than the Appellant's own opinion of value. She further argued that the assessor had taken into account the defects in the subject dwelling which is reflected in the 30% rate of depreciation suggested by the assessor. She also argued that the four comparable sales referred to by the assessor supported his estimate of value of the subject property.

The Board agrees with the contention of the Appellant that "property evaluation is not an exact science...". Undoubtedly, there is a good measure of subjectivity involved in the process of evaluating property. There are honest differences of opinion even among qualified experts on such matters as the determination of a rate of depreciation and a rate to reflect obsolescence when using the cost approach in evaluating residential real property. In the case at hand the assessor, Mr. Matheson, rated the subject dwelling as "Good" and because of the age of the building applied a depreciation rate of 30% which he obtained from the Nova Scotia Assessment Manual. It is quite conceivable that another assessor or real estate appraiser could have rated the subject property as "Average" and therefore would have applied a higher rate of depreciation. The Board has not viewed the subject property and is therefore not prepared to substitute its opinion on this question for that of the trained and qualified assessor.

Although the sole issue in this appeal is the determination of the proper assessment value of the Appellant's property for the 1984 assessment year it is clear that the Appellant's property was over-assessed for the years 1981 and 1982 which is reflected in the fact that his 1983 assessment was reduced from $42,900.00 to $41,000.00. The Board can readily appreciate the Appellant's concern as to how his 1984 assessment was determined by Mr. Matheson in light of the fact that Mr. Matheson did not carry out anything more than a cursory ten minute examination of the exterior of the Appellant's dwelling and garage sometime in either 1982 or 1983. He of course had certain information available to him from the assessment card relating to the subject property. It is clear that a complete assessment review of the Appellant's property was not carried out by Mr. Matheson prior to the 1984 assessment and was not carried out until after the Appellant filed his 1984 appeal which resulted in the appraisal report filed as Exhibit H-4. It may only be co-incidental but the assessor as the result of his detailed assessment study placed a value of $44,250.00 on the subject property which is exactly the same amount as the figure he previously used for purposes of the 1984 assessment.

Unfortunately for the Appellant he was not able to provide the Board with any substantial or credible evidence to support his contention that his property was over valued for assessment purposes. He did endeavour to show that his two neighbours were under assessed in relation to his assessment although his evidence in this regard was weak. Even had he been successful in showing that the neighbouring properties were under assessed this would not have been sufficient evidence for the Board to reduce his assessment. If his complaint is that his neighbours' properties are assessed too low he could have appealed their assessments under the provisions of Section 77(2) of the Assessment Act.

The Board accepts the evidence of the assessor, Mr. Matheson, that the sum of $44,250.00 is the proper value of the subject property for assessment purposes for the 1984 assessment year. The Board in accepting Mr. Matheson's evidence is satisfied that he took into consideration all relevant facts concerning the Appellant's property.

The Board is also satisfied that the Appellant's property has been assessed for the year 1984 at its market value in compliance with Section 38 of the Assessment Act. Section 38 reads as follows:

> "All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

The Board therefore confirms the 1984 assessment of the Appellant's property and the appeal is dismissed.

Since counsel for both the Municipality of East Hants and for the Director indicated they were not seeking costs there will be no costs awarded.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 10th day of September, A.D., 1984.

RHBlois

R.H. BLOIS, Q.C.,
Chairman, Municipal Board.

Director of Assessment v. Lord Nelson Hotel Ltd.
Lord Nelson Hotel Ltd. v. Director of Assessment

ASSESSMENT--COMMERCIAL AND RESIDENTIAL--JURISDICTION--COMPANIES FAILURE TO SUPPLY INFORMATION--HOTEL COMPLEX--WHETHER PART RESIDENTIAL--WHETHER LOUNGE AND BEVERAGE ROOM PART OF HOTEL COMPLEX OR ADJACENT COMMERCIAL COMPLEX--WHETHER INCOME FROM PARKING AREAS PART OF HOTEL INCOME--VALUATION OF FURNITURE, FIXTURES AND EQUIPMENT--ASSESSMENT ACT, Ss. 1(naa), 17, 20, 23(a), 100(4), 108(1)--MUNICIPAL BOARD ACT, S. 27(1)

Both the Director of Assessment and the Lord Nelson Hotel Ltd. (the Company) appealed from a decision of the Regional Assessment Appeal Court, Halifax City Region which fixed the 1981 and 1982 assessments of the Lord Nelson's property at the corner of Spring Garden Road and South Park Street at $4,580,300.00. The City of Halifax participated pursuant to s. 27(1) of the Municipal Board Act. The Company's property was divided on the assessment roll into five pieces: a commercial complex, a hotel and parking lots 1, 2 and 3. No appeal was taken with respect to the assessment of the commercial complex. The Director has assessed the hotel and parking lots at $5,864,800. The Director and City objected to the Board's jurisdiction with respect to the 1981 assessment on the basis that the Company had failed to comply with s. 17 of the Assessment Act respecting a request for information and had lost its right to appeal under s. 20.

HELD--1. The Board does not have jurisdiction to determine whether the Company had lost its right of appeal and therefore the Company is not precluded from appealing its 1981 assessment.

2. The appeals are allowed and the property is assessed as commercial with a value of $4,587,600.00 for 1981 and $4,468,600.00 for 1982. The Board is not prepared to award costs.

Section 20 of the Assessment Act does not stipulate who should determine whether a person has lost his statutory right of appeal. It could not have been the intent of the Legislature that the assessor who is given the power to demand information should also be given the judicial power to decide that the person did not comply with his demand. This is a "question relating to the assessment" aside from "a question as to persons alleged to be wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum or whose property is wrongfully classified" (s. 108(1)). The Legislature has given the Board a limited jurisdiction in assessment matters and it does not include a determination as to whether the Company has lost its right of appeal. This must be decided on application to the Supreme Court or County Court, and there is no evidence that this has been decided in this case.

The general issues raised are (1) the classification of the part of the hotel complex known as Trafalgar Towers, and (2) the valuation of the hotel complex and the three parking lots for the 1981 and 1982 assessment years. As to the Trafalgar Towers question, commencing in 1976 the Company had begun offering the 150 rooms in this old section of the hotel on a monthly basis with the Company supplying full furnishings, maid service, heat, lights and hot and cold water. Phones were the responsibility of the individual occupant. There was a prohibition against cooking. The Company argued that this portion of the hotel was "residential property". This term is defined in s. 1(naa) of the Assessment Act as not including "the portion of a hotel or motel used for the purpose of lodging for the public". In the opinion of the Board all rooms in the Lord Nelson Hotel are being used for the purpose of lodging for the public. Some rooms in the Trafalgar section may be occupied by a person for an extended period, but when he leaves, his room may be occupied by an overnight guest. The prohibition against cooking in the rooms and the fact that the hotel's extended period occupancy contract expressly restricts the room occupant's relationship to that of hotel and hotel guest does not make the rooms so occupied comparable to residential properties such as homes rented for several months at a time. These rooms are a portion of the hotel used for lodging for the public and the entire hotel property should be classified as commercial. On the question of valuation, one issue is whether in valuing the hotel complex the Victory Lounge and the Lord Nelson Beverage Room should be included. In the Board's opinion they are an integral part of the Hotel operation and not separate and distinct entities which should be included in the Commercial Complex. The income from these facilities should be added to the hotel income when determining its market value for assessment purposes. The income from these facilities were included in the 1981 and 1982 assessments for the Commercial Complex as well as the Hotel Complex. This is an error, but since the Company did not appeal the assessment in respect of the Commercial Complex the Board does not have the power to correct the over-assessment. It may be possible to obtain relief, though, from Council. Another issue is whether the income from the parking areas should be included with the income of the hotel. In the opinion of the Board it should not because the income is not derived from the hotel operation. The final valuation issue is what value for hotel furniture, fixtures and equipment should be deducted to arrive at the proper assessed value for the hotel. The value of the hotel is determined by the income method, which utilizes the present and future income streams. However, the hotel's assets including furniture, fixtures and equipment are necessary to produce that income. Since furniture, fixtures and equipment are not assessable property under the Assessment Act, it is necessary to reduce the market value by the value of these items. The assessor has attempted to do this based on the income the furniture, fixtures and equipment produce. However, in the opinion of the Board it is not possible with any degree of reliability to measure the income contribution which they make to the overall hotel income. A more appropriate method to determine the market value of the hotel property excluding furniture etc., is to estimate by accepted appraisal methods the market value of these items and to subtract that value from the overall value of the hotel. The Board accepts the Company's appraisor's estimate of $750,000.00, which is based on information obtained about the sale of the Hotel Nova Scotian in 1981, a property similar to the subject one in terms of age, style, construction, number of rooms and facilities. It is necessary for the assessor to consider many factors in valuing furniture, fixtures and equipment, including cost, methods used to depreciate cost and the assets' remaining useful life. This must be done separately for each hotel or motel. The three parking lots should be included on the assessment roll with the hotel and so all four should be considered one "piece of assessable property" with a commercial classification and with one value for both the 1981 and 1982 assessment years.

****

NOTE: Application was made by the Director and the City of Halifax to the Trial Division of the Supreme Court of Nova Scotia for a determination pursuant to Section 108(1) of the Assessment Act relating to an Appellant's loss of a right of appeal pursuant to Section 20 of the Assessment Act. MacIntosh, J. reserved his decision until briefs were filed by all parties. (See Supreme Court File No. S.H. 49649).

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, c.14 as amended;

- and -

IN THE MATTER OF: An Appeal by the Director of Assessment from the decision of the Regional Assessment Appeal Court, Halifax City Assessment Region respecting the assessment of the commercial property of the Lord Nelson Hotel Limited located in the City of Halifax,

- and -

IN THE MATTER OF: An Appeal by the Lord Nelson Hotel Limited from the decision of the Regional Assessment Appeal Court, Halifax City Assessment Region respecting the assessment of its commercial property located in the City of Halifax

BEFORE:	R.H. BLOIS, Q.C. Chairman ELIZABETH LAWRENCE, Vice-Chairman DARRYL WILSON, C.A., LL.B., Member
COUNSEL:	Stewart McInnes, Q.C. for the Lord Nelson Hotel Limited MARIAN F.H. TYSON, LL.B., for the Director of Assessment MARY E. DONOVAN, LL.B., for the City of Halifax

DECISION

By Notice of Appeal dated May 11, 1983, the first Appellant, the Director of Assessment, hereinafter referred to as the Director, appealed the decision of the Regional Assessment Appeal

Court, Halifax City Assessment Region, dated March 31, 1983 respecting the 1981 and 1982 assessments of the Lord Nelson Hotel Limited's commercial property located at the northeast corner of Spring Garden Road and South Park Street and known as Civic Numbers 1551 South Park Street, 1557 South Park Street and 5675 Spring Garden Road, fixed by the Regional Assessment Appeal Court, Halifax City Assessment Region, in the amount of $4,580,300.00 for 1981 and for 1982.

By Notice of Appeal dated May 11, 1983, the second Appellant, the Lord Nelson Hotel Limited, hereinafter referred to as the Company, also appealed the decision of the Regional Assessment Appeal Court, Halifax City Assessment Region, dated March 31, 1983 respecting the 1981 and 1982 assessments of its commercial property.

The City of Halifax, through its Solicitor, participated in the hearing pursuant to the provisions of Section 27(1) of the Municipal Board Act, c.9, S.N.S. 1981 which reads as follows:

> "27(1) Parties to any application, appeal or other matter or proceeding before the Board include
>
> (a) the applicant or appellant;
>
> (b) the person responsible for a decision or act that is appealed;
>
> (c) any municipality and any board, commission, committee or agency thereof that may be affected;
>
> (d) the Minister."

The Board initially scheduled the hearing of this appeal for July 18, 1983. At the request of the Director and with the consent of the Company, the hearing was rescheduled for September 26, 1983. At the request of the Company and with the consent of the

Director, the hearing was further adjourned and eventually heard on November 21, 23 and 24, 1983 in the Board Room of the offices of the Expropriations Compensation Board, Suite 904, 1660 Hollis Street, Halifax, Nova Scotia. Briefs were filed with the Board subsequent to the completion of the hearing with the last brief received by the Board on February 6, 1984.

The Notice of Appeal filed with the Board by the Solicitor for the Company did not state any grounds of appeal and thus did not comply with Section 100(4) of the Assessment Act which reads as follows:

> "100(4) A Notice of Appeal shall state with particularity the grounds of appeal."

Council for the Director did not raise any issue with respect to the non-compliance with the provisions of Section 20 by the Company.

The Director's Notice of Appeal sets forth the following grounds of appeal:

"1. The Regional Assessment Appeal Court wrongly determined that the Appellant had not lost its right to appeal the 1981 assessment;

2. The Regional Assessment Appeal Court was wrong in determining that the actual income of the parking lots should be considered along with the hotel income, but that the income of the Lord Nelson Beverage Room and the Victory Lounge should not be included with the other hotel income;

3. The Regional Assessment Appeal Court was wrong in the treatment of income from the Lord Nelson Beverage Room and the Victory Lounge;

4. The Regional Assessment Appeal Court was wrong in determining that, on the basis of the sale of the Nova Scotia Hotel, the subject property is over-assessed;

5. The capitalization rate used by the Regional Assessment Appeal Court is too high;

6. The Regional Assessment Appeal Court was wrong in rejecting evidence of the assessor and accepting evidence of Mr. Hardy;

7. Such other grounds that may appear from the evidence."

The Company's property for the years 1981 and 1982 was divided on the assessment roll into five pieces of assessable property identified as commercial complex, hotel, and parking lots 1, 2 and 3. The assessment of the commercial complex which contains an office block and retail arcade was not appealed for either the 1981 or 1982 assessment year.

The assessments for the 1981 and 1982 assessment years were as follows:

Hotel - commercial	$4,033,600
Hotel - residential	$1,315,900
Total - Hotel	$5,349,500
Parking Lot 1 - commercial	$ 142,600
Parking Lot 2 - residential	$ 214,100
Parking Lot 2 - commercial	$ 78,100
Parking Lot 3 - residential	$ 80,500
Total assessment for 1981 and 1982	$5,864,800

The commercial portion of the hotel assessment includes the hotel rooms, restaurant, facilities, banquet rooms, salons, the Victory Lounge, the Lord Nelson Beverage Room and the commercial areas occupied by the Royal Bank of Canada Limited, Lawton's Drug Store Ltd. and the United Cigar Store. The residential portion of the hotel assessment relates to 150 rooms in an area of the hotel known as Trafalgar Towers.

The Regional Assessment Appeal Court, Halifax City Assessment Region determined the 1981 and 1982 assessment for the hotel complex to be $4,580,300.00 commercial, an overall reduction of $1,284,500.00 from the original assessments. In reaching this decision, the Regional Assessment Appeal Court changed the residential classification of that portion of the hotel known as Trafalgar Towers to commercial, included the assessed value of the three parking lots as part of the assessed value of the hotel and struck the three parking lot assessments from the 1981 and 1982 assessment rolls.

Counsel for the Director and the City of Halifax raised a preliminary objection to the Board's jurisdiction to hear the appeal of the Company respecting its 1981 assessment. Counsel for the Director and the City submit that the Company lost its right to appeal its 1981 assessment pursuant to Section 20 of the Assessment Act because of its failure to answer, complete and return the form referred to in Section 17. Section 17 of the Act reads as follows:

> "17(1) Every person shall give to the assessor all necessary information requested by him for the purpose of enabling him properly to assess the property of that person.
>
> (2) The Director may cause to be delivered to any person a request for relevant information required by him in order to make a proper assessment of the property or occupancy assessment of the person to whom the request is delivered.
>
> (3) Any request shall be sufficiently delivered if mailed by registered mail, postage prepaid, addressed to the person at the last address known to the assessor."

Section 20 of the Act reads as follows:

> "Every person who:
>
> (a) knowingly provides an assessor with false information in response to a request for information whether delivered under Section 17 or otherwise, or
>
> (b) neglects, refuses or fails
>
> (i) to give to an assessor information reasonably required by him, or
>
> (ii) to furnish any particulars required by this Act or by a form authorized thereby, or
>
> (iii)to provide information in response to a request under Section 17 or to answer, complete and return the form referred to in Section 17
>
> is guilty of an offence under this Act and, whether or not he has been prosecuted or paid any fine or served any imprisonment to which he has been sentenced, he shall not be entitled to appeal from the assessment of his property for the year in respect of which the information, particulars or form were requested."

The Board heard evidence with respect to the allegation that the Company failed to answer, complete and return a Section 17 form. Counsel for the Director and the City requested the Board to make a finding that the Company failed to comply with the provisions of Section 17 and thus has lost its right of appeal respecting its 1981 assessment. Counsel for the Company argues that the Board does not have jurisdiction to determine whether a person has lost his right of appeal with respect to an assessment of his property for the year in which a Section 17 form was requested. Counsel for the Company submits that the question of whether a person has lost his right to appeal pursuant to Section 20 is a "question relating to the assessment" which should be determined by a Judge of the Supreme

Court or County Court pursuant to an application under Section 108(1) of the Act.

Section 108(1) of the Act reads as follows:

> " The town or municipality, the Director or any person assessed may apply on originating summons (notice) to Supreme Court or to the County Court for the determination of any question relating to the assessment, except a question as to persons alleged to be wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum or whose property is wrongly classified."

Counsel for the Director and the City argue that an application under Section 108 is an optional procedure which provides a way of getting to the Supreme Court or County Court on a question relating to the assessment but it does not preclude the question of whether a person has lost his right of appeal pursuant to the provisions of Section 20 being determined by the Board on appeal from a decision of the Regional Assessment Appeal Court. They refer the Board to the comments of Judge O'Hearn in Dartmouth Yacht Club v. City of Dartmouth (1979) 32 N.S.R. (2d) 285 at page 301:

> " That is sufficient to dispose of the objection, but there may be more fundamental ways of dealing with it. With respect to the existance of s.108, there is, for example, nothing in the Act to indicate that it is a strict alternative to the appeal to the county court, provided by ss.99 to 101. It appears rather to be the civil counterpart in assessment cases of the stated-case procedure under the Criminal Code and the Summary Proceedings Act. This is, a way of by-passing the Assessment Appeal Court to get to lawyer-law courts quickly and by a simple process. Nothing in the structure of the Act requires that the jurisdiction of the county court be ousted thereby, or exercisable only through this narrow procedure."

Counsel for the Director and the City submit that Section 20 of the Act limits the jurisdiction of the Regional Assessment

Appeal Court and the Board to hear appeals only from persons who have provided the information requested pursuant to Section 17. They further submit that "It is a fundamental principle of law that a Board such as the Nova Scotia Municipal Board has the power in the first instance to decide whether it has jurisdiction to hear a matter." Therefore, they argue the Board can decide whether or not the company lost its right to appeal its 1981 property assessment.

The Board also was referred to the decision of Judge O'Hearn in Director of Assessment v. Wedgewood Motel Limited and the City of Halifax, C.H. 33165 dated October 3, 1980. This decision related to an application by the Director of Assessment on Originating Notice to the County Court for a declaration that the Wedgewood Motel Limited was not entitled to appeal the assessment of its property for the 1980 assessment year because of its failure to provide information in response to a request by the Director pursuant to Sections 17 and 20 of the Act.

Judge O'Hearn in an oral decision stated:

> " Well, essentially this case depends upon the determination of the meaning of Sections 15 and 20 and Sections 103 and 108 of the Assessment Act. Taking up that last portion first because it really is a question of whether this is properly before the court. Section 108 permits the Director to apply to this court for 'the determination of any question relating to the assessment' except certain ones which are not in issue here.

> Any 'question relating to the assessment' has been held in our Court of Appeal......and I have had to deal with it myself as covering matters outside of, for example, wrongful classification. I recall recently dealing with it in connection with the Dartmouth Boat Club. But that was on an appeal so that the question arising there must have been a question of classification rather than the kind of thing that led to problems in the Olympia case and the other ones in the Ontario Municipal Board structure where the Ontario Municipal Board, not being composed of Section 96 judges,were not competent to decide the questions of law that arose there because of the background in Ontario. Our Court of Appeal has, I think, taken this kind of thing into its cognizance and my impression of the decision of Mr. Justice Coffin, the latest one that went out, is that there is no problem with respect to the County Court in any case.
>
> But obviously Section 108 was, I think, included in the Act to deal with those questions. And the question here is an analagous one whether the provisions of the Act prevent the appeal from being heard by the Assessment Appeal Court. I think it really turns on Section 108, sub-section (1) on the point whether 'assessment' there is to be given a narrow meaning, referring only to the actual result of the assessment process or whether it includes the process. And considering the purposes of this particular provision I think it must be given the broader meaning, that is, it includes the process of assessment. Because obviously the purpose of the Section would be frustrated if that were not so.
>
> .....Section 108 can be construed and ought to be construed I think in view of its purpose as dealing with this kind of question."

Section 20 of the Assessment does not stipulate who should determine whether a person has lost his statutory right of appeal. In the opinion of the Board, the Legislature could not have intended that the assessor, who was given the power to demand information pursuant to the provisions of Section 17 also would be given the judicial power to decide that the person did not comply with his demand. In the opinion of the Board, a person has a right to a separate judicial determination of whether he has lost his right of appeal pursuant to provisions of Section 20 of the Act.

In the opinion of the Board and as stated by Judge O'Hearn the question of whether a person has lost his right of appeal pursuant to Section 20 by reason of his failure to answer, complete and return a Section 17 form is a "question relating to the assessment" aside from "a question as to persons alleged to be wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum or whose property is wrongfully classified". Also in the opinion of the Board, the question of a loss of right of appeal pursuant to Section 20 is not a question which can be considered as falling within the Board's inherent power to determine questions relating to its jurisdiction, such as whether a Notice of Appeal was filed within time. In the opinion of the Board, the Legislature has given the Board a limited jurisdiction in assessment matters and it has specifically provided in Section 108(1) that any question relating to the assessment other than those matters reserved to the Regional Assessment Appeal Court and therefore the Board, be dealt with by way of application on Originating Notice to the Supreme Court or County Court.

In the opinion of the Board, it does not have jurisdiction to determine whether the Company has lost its right of appeal pursuant to Section 20 and there was no evidence presented to the Board indicating that the Supreme Court or County Court decided that the Company had lost its right to appeal the assessment of its property for the 1981 assessment year. Therefore, in the opinion of the Board, the Company is not precluded from appealing the 1981 assessment of its property because of an alleged non-compliance with the provisions of Section 17 of the Assessment Act.

The general issues raised in this appeal are:

(1) the classification of that part of the hotel complex known as Trafalgar Towers and

(2) the valuation of the hotel complex and the three parking lots for the 1981 and 1982 assessment years.

The first issue to be considered is the appropriate classification of that part of the hotel known as Trafalgar Towers. Mr. Neil Franklin is the President of Franklin Enterprises Limited, the present owner of the Lord Nelson Hotel. He has been involved in the operation of the Hotel for the last ten years and he gave evidence on behalf of the Company. He said that in 1976 the hotel owners were agonizing over what best to do with the old section of the hotel built in 1927. The owners came up with the Trafalgar Towers concept.

In a letter dated November 29, 1977 to Mr. John Cameron, the then Director of Research, Department of Municipal Affairs, which was introduced as part of Exhibit L-13, Mr. Franklin requested the reclassification of a section of the hotel known as Trafalgar Towers from commercial to residential. In his letter to Mr. Cameron, Mr. Franklin states:

> " The Lord Nelson Hotel Limited announced the opening of "Trafalgar Towers" on September 1, 1976. The Trafalgar Tower operation is an exclusive area within the Lord Nelson Hotel complex, comprised of 150 rooms offering apartment-style accommodation to the public.

> Bachelor and bathroom or larger suites are available on a monthly basis. Experience has shown that the average length of stay is approximately three months. The rooms are fully furnished (including colour T.V.), with private bath and weekly maid service provided and included in the rent. Phone installation and service is the responsibility of the individual resident. In addition, the Hotel supplies light and power as well as the usual heating and supply of hot and cold water.
>
> The 150 rooms in question are kept separate and apart from the Hotel operation and are used exclusively for housing Trafalgar Tower residents. The monthly rental rate is substantially lower than what normally would be charged if these rooms were being sold as Hotel accomodation.
>
> Obviously, we feel that the Trafalgar Tower operation should be reclassified as residential property in that it is and will continue to be used for residential purposes only."

Mr. Cameron's reply was by letter dated December 1, 1977 which also was introduced as part of Exhibit L-13. Mr. Cameron in his letter stated:

> " Thank you for your letter of November 29, 1977 and the enclosed information concerning the Trafalgar Tower operation.
>
> I think I can agree with your submission, although I must note that the prohibition against cooking in the rooms gives me some pause. One of the standard tests of "residential" is meals. However, on balance I would say that the operation is properly classified as residential. I will inform the regional director of assessment of my opinion by copy of this letter.
>
> The change will apply to the assessment for 1978 and subsequent years, presuming no further changes, but cannot be backdated to apply to 1977."

In the course of his direct examination Mr. Franklin stated that any person wishing to be a long term guest in the Trafalgar section of the Hotel was required to enter into an extended occupancy contract with the Company. Mr. Franklin stated that a long term guest is required to pay for a minimum stay of one month. According to Mr. Franklin, the average length of stay of long-term guests is two to three months. The long-term guests are not allowed to cook in their rooms.

On cross-examination, Mr. Franklin stated that originally 149 rooms were available for long-term guests. However, during the years 1980 and 1981, 38 of 149 rooms were used for transient guests which meant that only 111 rooms were available for long-term guests. The most rooms rented at one time, pursuant to the extended occupancy contract, was 95. Mr. Franklin considered 20 long-term guests currently occupying rooms under an extended term contract to be permanent guests of the Hotel because they had been residing in the Hotel for more than 5 or 6 months. Mr. Franklin said that these guests could leave at any time and their room, once vacant, could be used for an overnight guest. Mr. Franklin estimated the net income for these twenty rooms for a year to be approximately $50,000.00.

Mr. Franklin also stated that rooms in the Trafalgar Towers section of the Hotel are used for overnight guests when the best rooms in the Hotel are rented.

Mr. Franklin stated that the current practice of the Hotel is to ask long-term guests who do not intend to stay during the summer months to leave at the beginning of the summer so that the Hotel can benefit financially by renting these rooms to tourists and others. Mr. Franklin also stated that the twenty rooms being occupied by what he considers permanent guests are located on the 6th and 7th floors of Trafalgar Towers but the rooms are not contiguous to one another.

Mr. Franklin said he thought the entire hotel was licensed under the Hotel Regulation Act, R.S.N.S. 1967, c.27. Also he thought that the rooms occupied by long-term guests should be subject to the Residential Tenancy Act, S.N.S. 1970 c.13 and the Rent Review Act, S.N.S. 1965, c.56 but he was not sure if the company had complied with the provisions of these Statutes. He did state that the Company had never had the rates charged to long-term guests reviewed by the Rent Review Commission.

The extended occupancy contract, a copy of which was introduced as part of Exhibit L-13, reads in part as follows:

> " In the event that this agreement shall be carried on beyond the termination date above set forth, such extension in each instance shall be for the next ensuing month only, and in no case shall create a tenancy or a relationship of landlord and tenant, but be restricted to the relationship of hotel and hotel guest."

The definition of "residential property" is found in Sub-Section 1(naa) of the Assessment Act and it reads as follows:

> " In this Act,
>
> (naa) "residential property" means property or part thereof used or intended to be used for residential purposes, but does not include the portion of a hotel or motel used for the purpose of lodging for the public;"

Counsel for the Company argues that 20 rooms occupied by long-term guests are not available for the purposes of lodging for the public. He submits that these 20 rooms are rented on an exclusive basis by "tenants" of the hotel for extended periods of time and the occupants are tenants similar to tenants who rent homes on a periodic basis.

Counsel for the Director and the City argue that if the 20 rooms in the Trafalgar Towers section of the hotel occupied by long-term guests are a portion of a hotel and are used for lodgings for the public, they are not "residential" property under the Assessment Act, whether or not the space is used or intended to be used for residential purposes. Counsel for the Director and the City argue that lodging includes overnight accommodation as well as accommodation for a longer period of time. Therefore, they submit that all rooms in the hotel are being used for the purpose of lodging for the public and are excluded from the definition of residential property in Sub-section 1(naa).

Counsel for the Director and the City also argue that it is not possible to designate a particular section of the hotel as residential property because a room in the Trafalgar Towers section of the hotel may be rented on one occasion to an overnight guest and on another occasion to a long-term guest. They submit that there are no rooms in the Trafalgar Towers section of the hotel set apart and used exclusively by long-term guests.

In the opinion of the Board, all rooms in the Lord Nelson Hotel are being used for the purpose of lodging for the public. On occasion, some rooms in the Trafalgar Towers section of the hotel may be occupied by a person for an extended period of time. When a long-term guest leaves the hotel, his room may be occupied by an overnight guest. The Hotel advertises that all rooms are available for public accommodation, although, at any one time some of the rooms in the Hotel may be occupied by long-term guests. In the opinion of the Board, the Hotel's prohibition against cooking in the rooms occupied by long-term guests and the fact that the hotel's extended occupancy contract expressly restricts the room occupant's relationship to that of a hotel and hotel guest does not make the rooms occupied by long term guests comparable, as Counsel for the Company suggests, to residential properties such as homes which are rented for several months at a time. The Board agrees with the submission of Counsel for the Director that the rooms occupied by long-term guests in Trafalgar Towers are a portion of the hotel and are used for lodging for the public. In the opinion of the Board, the entire hotel property including the part known as Trafalgar Towers should be classified as "commercial."

The next issue to be considered is the valuation of the hotel complex and the parking lots for the 1981 and 1982 assessment years. Mrs. Gloria McCluskey, A.A.C.I., Assistant Provincial Director of Assessment gave evidence on the issue of valuation on behalf of the Director. Mr. Charles Hardy, B.Sc., A.R.I.C.S., A.A.C.I., Vice-President of Pat King Appraisals Limited, gave evidence on the issue of valuation on behalf of the Company.

In the opinion of Mrs. McCluskey and Mr. Hardy, the income method is the appropriate method to value the hotel complex for assessment purposes (in accordance with Section 38 of the Assessment Act) because the subject property is an income producing property and as such a purchaser would be solely interested in the return on investment by way of net income and cash flow that could be produced from the property. The income method involves determining the net income from the property for a particular year and then capitalizing that income by an appropriate capitalization rate taken from the market place. In the opinion of Mrs. McCluskey and Mr. Hardy, the three parking lots are an integral part of the hotel complex and should be valued as part of the hotel complex. Both Mrs. McCluskey and Mr. Hardy said the most appropriate method to value the parking lots for assessment purposes is to add the income from the parking lots to the hotel income and capitalize that income along with the other income of the hotel. In the opinion of Mrs. McCluskey and Mr. Hardy, the separate valuation of the three parking lots on the assessment roll should be deleted as their assessed value will be included in the assessed value of the hotel complex.

Mrs. McCluskey said that there were no sales of hotel properties from which an appropriate capitalization rate could be derived for the subject property. Her analysis of sales of other investment properties indicated a capitalization rate of 14% to be an appropriate capitalization rate for the subject property. Mr. Hardy also said an appropriate capitalization rate for the subject property was difficult to establish because of the lack of hotel sales in the city. Mr. Hardy analyzed the sales of hotels in other areas of the province and in other provinces. His analysis indicated that luxury type hotels have a capitalization rate in the range of 12 to 14% while older type properties in urban communities have a capitalization rate in the range of 14 to 16%. In his opinion, 14% was an appropriate capitalization rate for the subject property.

Mrs. McCluskey indicated that the general level of the roll was 93.3% in 1981 and 80.3% in 1982. The general level of the roll is determined by:

(1) totalling the sale prices of all properties which sold in the city in a particular year;

(2) totalling the assessed value of those same properties;

(3) dividing the total assessed value by the total sales value and

(4) multiplying by 100.

Mrs. McClusky determined the assessed value of the hotel complex for the years 1981 and 1982 as follows:

(a) Hotel Complex excluding the space occupied by the Royal Bank, Lawton's Drug Store and United Cigar Store

	1981	1982
Revenue	3,875,532	4,448,330
Expense	2,930,768	3,421,581
Net Income	944,764	1,026,749
Capitalization Rate	.2129	.2064
Estimate of Value	4,437,595 (944,764 ÷ .2129)	4,974,559 (1,026,749 ÷ .2064)

(b) Space occupied by the Royal Bank, Lawton's Drug Store and the United Cigar Store

	1981	1982
Revenue	180,723	182,820
Expense	45,180	45,705
Income	135,543	137,115
Capitalization Rate	.1817	.1765
Estimate of Value	745,971 (135,603 ÷ .1817)	776,856 (137,115 ÷ .1765)

(c) Final estimate of value of Hotel Complex

		1981	1982
(a)	Hotel Space	4,437,595	4,974,559
(b)	Commercial space	745,971	776,856
		5,183,566	5,751,415
	General Level of the Roll	93.3	80.3
	Assessed Value	4,836,267	4,618,386
	ROUNDED TO	4,836,300	4,618,400

Mr. Hardy determined the assessed value of the Hotel Complex for the years 1981 and 1982 as follows:

	1981	1982
Revenue	3,829,058	4,415,816
Expense	2,970,093	3,461,918
Net Income	858,965	953,898
Capitalization Rate	.1898	.18368
Value including furnishings, fixtures and equipment	4,525,632	5,192,977
Less: value of furnishing, fixtures and equipment	750,000	750,000
	3,775,632	4,442,997
General Level of the Roll	93.3%	80.3%
Assessed Value	3,522,664	3,567,710
ROUNDED TO	3,523,000	3,568,000

Mrs. McCluskey and Mr. Hardy disagree on the following points:

Income from the Victory Lounge and Lord Nelson Beverage Room

Mrs. McCluskey included in the net income of the Hotel Complex for 1981 the sum of $243,000.00 which was the net income from the space occupied by the Victory Lounge and the Lord Nelson Beverage Room. In her opinion, the Victory Lounge and Lord Nelson Beverage Room are part of the Hotel Complex and should be assessed as part of the Hotel Complex. Mrs. McCluskey admits that in 1981 the space occupied by the Victory Lounge and Lord Nelson Beverage Room was also assessed as part of the Commercial Complex. In other words, the Lord Nelson Hotel Limited was assessed twice in

1981 for the space occupied by the Victory Lounge and Lord Nelson Beverage Room; first, as part of the Commercial Complex assessment and second as part of the Hotel Complex assessment. According to Mrs. McCluskey, the assessment of the Commercial Complex is incorrect. She said she could not, at this time, correct the double assessment because the incorrect assessment of the Commercial Complex was not appealed and in her opinion, the Hotel Complex assessment would be incorrect if it did not include the income from the Victory Lounge and Lord Nelson Beverage Room. In Mr. Hardy's opinion, the Victory Lounge and Lord Nelson Beverage Room are separate and distinct entities within the Commercial Complex and are correctly valued for assessment purposes as part of the Commercial Complex and should not be included with and valued as part of the Hotel Complex.

Mrs. McCluskey repeated the same error in 1982 by assessing the space occupied by the Victory Lounge and Lord Nelson Beverage Room as part of the Hotel Complex and as part of the Commercial Complex. The income from the space occupied by the Victory Lounge and Lord Nelson Beverage Room included in the Hotel Complex income for 1982 is $231,077.00.

Income from the Commercial Complex Parking Lot

Mr. Hardy included in the net income of the Hotel Complex for both 1981 and 1982 the sum of $15,743.00 which was the net income from the Commercial Complex Parking Lot. In Mr. Hardy's opinion, the overall complex which includes the Hotel Complex and Commercial Complex would be undervalued for assessment purposes if this income was not added to the net income of the Hotel Complex. In

Mrs. McCluskey's opinion, the income from the Commercial Complex Parking Lot should have been included with the net income of the Commercial Complex. Mrs. McCluskey had neglected to include this income in the income of the Commercial Complex when she was preparing the 1981 and 1982 assessments of the Commercial Complex. However, she said she cannot, at this time, adjust the assessed value of the Commercial Complex because that assessment was not appealed and in her opinion the assessed value of the Hotel Complex would be incorrect if she included the Commercial Complex Parking income with the Hotel Complex income.

Mrs. McCluskey and Mr. Hardy agree on all other revenue items for 1981 and 1982.

Expenses

Mr. Hardy excluded $7,100.00 in 1981 and $6,500.00 in 1982 in advertising costs relating to the Victory Lounge and the Lord Nelson Beverage Room from his expense total for the Hotel Complex while Mrs. McCluskey included these amounts in her total. Also, Mr. Hardy allocated $1,245.00 more in 1981 and $1,132.00 more in 1982 of the total administration expenses of the Hotel Complex and Commercial Complex to the Hotel Complex than Mrs. McCluskey. This difference is not considered significant by Mrs. McCluskey or Mr. Hardy. The net difference in expense totals between Mrs. McCluskey and Mr. Hardy is $5,855.00 in 1981 and $5,368.00 in 1982. Mrs. McCluskey and Mr. Hardy agreed on all other expense items for 1981 and 1982.

Capitalization Rate

Mr. Hardy and Mrs. McCluskey agreed on the use of a base capitalization rate of 14% as well as the inclusion of a rate depicting taxes in the establishment of a composite capitalization rate.

Mrs. McCluskey determined the composite capitalization rate for the Hotel Complex excluding the Royal Bank, Lawton's Drug Store and United Cigar Store as follows:

		1981	1982
Base Rate		.1400	.1400
Commercial tax rate x general level of the roll			
1981	6.1985 x .673	.0417	
1982	3.9119 x .933		.0365
Business occupancy tax rate x general level of the roll x Business occupancy rate for hotel			
1981	6.0865 x .675 x .25	.0102	
1982	3.8239 x .933 x .25		.0089
		.1919	.1854
Rate for furniture, fixtures and equipment			
	.1400 x .15	.0210	.0210
		.2129	.2064

Mrs. McCluskey calculated the composite capitalization rate for the premises occupied by the Royal Bank, Lawton's Drug Store and the United Cigar Store as follows:

	1981	1982
Base Rate	.1400	.1400
Commercial Tax Rate x general level of the roll		
1981 6.1985 x .673	.0417	
1982 3.9119 x .933		.0365
	.1817	.1765

Mr. Hardy calculated the composite tax rate for the total complex including the premises occupied by the Royal Bank, Lawton's Drug Store and United Cigar Store as follows:

	1981	1982
Base Rate	.1400	.1400
Commercial Tax Rate x general level of the roll		
1981 6.1985 x .673	.0417	
1982 3.9119 x .933		.03649
Business occupancy tax rate x general level of the roll x business occupancy rate for hotel x percentage of assessed property occupied by hotel subject to business occupancy tax		
1981 6.0865 x .673 x.25 x .790	.0081	
1982 3.82 x .933 x.25 x .807		.00719
	.1898	.18368

The main difference between Mr. Hardy's composite capitalization rate of .1898 for 1981 and .18368 for 1982 and Mrs. McCluskey's composite capitalization rate of .2129 and .1817 for 1981 and .2064 and .1765 for 1982 is accounted for by the inclusion by Mrs. McCluskey in her composite capitalization rate of a factor of .0210. The addition of this factor to the base capitalization rate is Mrs. McCluskey's method of calculating the income contribution of furniture, fixtures and equipment to the Hotel income and when applied to the net income of the hotel part of the Hotel Complex indicates the value of the furniture, fixtures and equipment within the hotel. Mr. Hardy calculated the value of furniture, fixtures and equipment by reference to other hotel sales and by means of a depreciated replacement cost and not by the addition of a factor to the base capitalization rate.

Both Mrs. McCluskey and Mr. Hardy agree that, although they have adopted different methods to exclude the business occupancy tax rate for the commercial part of the hotel complex from the composite capitalization rate, each of their methods is acceptable and both methods achieve the desired effect of excluding the business occupancy tax rate for the commercial part of the Hotel Complex from the composite capitalization rate for the entire Hotel Complex.

The foregoing can be reduced to three issues.

1. Should the income from the Victory Lounge and Lord Nelson Beverage Room and the related advertising expenses be included with the income and expense totals for the hotel operations for the years 1981 and 1982?
2. Should the income from the parking areas associated with the Commercial Complex be included with the income of the hotel operation for the years 1981 and 1982?
3. What value for the hotel furniture, fixtures and equipment should be deducted from the value of the hotel complex to arrive at the proper assessed value of the hotel.

According to Mr. Franklin, the premises occupied by the Victory Lounge and Lord Nelson Beverage Room are located away from the main hotel operation and are directly accessible by way of an outside entrance from Spring Garden Road. Both the Victory Lounge and Lord Nelson Beverage Room are also accessible from the hotel by way of a circuitous route through the hotel and the Commercial Complex. According to Mr. Franklin, the Victory Lounge and the Lord Nelson Beverage Room serve the general public rather than hotel guests. He said the hotel has a "half-lounge" located off the main lobby which serves hotel guests. Mr. Franklin also stated that the company itself operates the Lord Nelson Beverage Room and the Victory Lounge and in its hotel advertisements invite the public to enjoy the Victory Lounge and Lord Nelson Beverage Room while staying at the hotel. The income from the Victory Lounge and Lord Nelson Beverage Room is included with the hotel income for accounting and reporting purposes by the company.

Mr. Hardy, on cross-examination, when asked if the entire complex was sold, how would he treat the income from the Lord Nelson Beverage Room and Victory Lounge, replied that since the owner is operating the Victory Lounge and Lord Nelson Beverage Room, he would include the actual income from these operations as part of the Hotel Complex income rather than assign an economic rental value to the space occupied by the Victory Lounge and Lord Nelson Beverage Room. Mr. Hardy also stated that in valuing hotels and motels which have restaurants and beverage rooms, he would include the income from the restaurant and beverage room with the other hotel or motel income provided that the restaurant and beverage room were an integral part of the hotel or motel's operation.

Mrs. McCluskey said that she included the income from the Victory Lounge and Lord Nelson Beverage Room in the hotel income because she considered them part of the Hotel's operation. Mrs. McCluskey said that the location of the Victory Lounge and Lord Nelson Beverage Room on a lot which contains part of the Commercial

Complex did not matter because 131 hotel rooms were located on the same lot as the Victory Lounge and Lord Nelson Beverage Room and the income from these rooms were included as part of the Hotel income.

Counsel for the Company submitted that the company did not appeal the assessment of the Commercial Complex because it agreed with that assessment.

The Victory Lounge and Lord Nelson Beverage Room are owned by the Company and operated by the Company as part of the Hotel's operation. This is evidenced through the Company's hotel advertisements as well as the Company's treatment of the Victory Lounge and Lord Nelson Beverage Room income for accounting and reporting purposes as part of the hotel. In the opinion of the Board, the Victory Lounge and Lord Nelson Beverage Room are in fact an integral part of the Hotel operation and not separate and distinct entities which should be included in the Commercial Complex.

In the Board's opinion, having determined that the Victory Lounge and Lord Nelson Beverage Room are part of the Hotel Complex, their income should be added to the hotel income when determining the market value for assessment purposes of the Hotel Complex.

The Board is aware that for 1981 and 1982 the Company has been over-assessed on its total property assessment which includes the commercial and business occupancy assessments of the Hotel Complex and the commercial and business occupancy assessments of the Commercial Complex. The over-assessment arose because of an error by the assessor which was admitted by Mrs. McCluskey. The error in the assessment for 1981 was brought to the assessor's attention after the 1981 assessments were received by the Company but according to Mrs. McCluskey, the error cannot be corrected because the 1981 assessment of the Commercial Complex was not appealed. The Board notes that under the provisions of Section 84 of the Assessment Act, the Director may alter the assessment complained of after a Notice of Appeal has been filed. Through oversight, Mrs. McCluskey did not alter the 1982 assessment of the Commercial Complex to adjust for the error brought to her attention in 1981 and this error could not be later corrected because the Commercial Complex assessment was not appealed in 1982.

In the opinion of the Board, it can only deal with an assessment of property which has been appealed pursuant to the provisions of the Assessment Act and in this instance that means the assessment relating to the Hotel Complex and not to the Commercial Complex. The Board therefore does not have the power to correct the over-assessment of the Commercial Complex.

It may be possible for the company to obtain some relief for the over-assessment by petitioning the Council of the City of Halifax pursuant to Section 142(1)(b) of the Assessment Act which reads as follows:

> "142(1) Upon the petition of a taxpayer supported by the affidavit, the council may:
>
> (b) relieve from the payment of all or any portion of the rates and taxes for the current or the previous year a taxpayer who by reason of any gross and manifest error in the assessment roll has been wrongly charged;"

The Board notes that Counsel for the City stated during the hearing that she was prepared to recommend to the City Council that the inequity of the over-assessment be relieved.

In the opinion of the Board, the income relating to the parking spaces associated with the Commercial Complex should not be included with the hotel income in determining the value of the hotel complex because it is not derived from the hotel operation.

The next issue concerns the valuation of furniture, fixtures and equipment. According to Mrs. McCluskey, when hotels are sold, their sale value is determined from the value of the present and future income stream of the hotel and not from the sum of the value of the hotels' various assets. However, the hotel's assets, including furniture, fixtures and equipment are necessary to produce that expected income. Since furniture, fixtures and equipment are not assessable property under the Assessment Act, it is necessary to reduce the market value of the Hotel Complex including furniture, fixtures and equipment determined by the income method by the value of the furniture, fixtures and equipment.

According to Mrs. McCluskey, it is appropriate to value the furniture, fixtures and equipment based on the income they produce. The method she used to determine the income contribution of furniture, fixtures and equipment to the hotel's income was to add a factor to the base capitalization rate. The factor to be added was calculated as follows:

Base Capitalization Rate	.1400
Rate for furniture, fixtures and equipment - .1400 x .15	.0210

According to Mrs. McCluskey the figure of .15 is an arbitrary figure which has no basis other than it appears reasonable to her. Mrs. McCluskey said the effect of adding .0210 to the base capitalization rate is to remove the income contribution of furniture, fixtures and equipment from the overall hotel income and thus enable a value to be determined for the hotel excluding furniture, fixtures and equipment.

Mrs. McCluskey stated at Page 32 of her report filed as Exhibit L-5 "the assessor, unlike the appraiser, in attempting to break out the income attributable to furniture, fixtures and equipment of hotel/motels must keep in mind that the method used must be one that can be used uniformly through the Province." Mrs. McCluskey said that if this method is accepted, it would be of great assistance to assessors and it would be a uniform method to measure the income contribution of furniture, fixtures and equipment to an hotel or motel's overall income.

The value of the furniture, fixtures and equipment using this method is calculated as follows:

	1981	1982
Net Income of Hotel part of Hotel Complex	944,764	1,026,749
Capitalized at .1919 for 1981 and .1854 for 1982 equals market value of hotel including furniture, fixtures and equipment	4,923,209	5,538,020
Capitalized at .2129 for 1981 and .2064 for 1982 equals market value of hotel excluding furniture, fixtures and equipment	4,437,595	4,974,559
Market value of furniture, fixtures & equipment	485,614	563,461

In Mr. Hardy's opinion, the value of the hotel's furniture fixtures and equipment for both 1981 and 1982 is $750,000.00. At Page 41 of his report filed as Exhibit L-4, Mr. Hardy states:

> " The contributory value of furnishings, fittings and equipment to an hotel are not constant from one property to another and from our investigations and discussions with the accommodation industry have indicated a range of between 15 and 30% of the total value. We have relied most heavily upon the transaction involving the Hotel Nova Scotian in 1981 as a guide to the most probable value of the furnishings, fittings and equipment within the subject property. The Hotel Nova Scotian was an almost identical property with regard to age, style and construction having approximately the same number of rooms (325) and similar facilities. We have had discussions with a representative of the purchaser of the property and seen a copy of the breakdown of the sale agreement with regard to the value attributable to furnishings, fittings and equipment. The value agreed upon by the vendors and purchasers as to the value of the furnishings, fittings and equipment in that transatio was $775,680.00 representing approximately 24% of the total purchase price, or representing a price per room of approximately $2,386.00. We have rounded the cost of furnishings, fittings and equipment on a per room basis to $2,250.00 per room and have applied this figure to the 333 rooms of the subject giving a rounded value of $750,000.00 which represents 16.4% of the actual cash value of the subject."

Mrs. McCluskey's estimate of the value of furniture, fixtures and equipment is 9.37% of her estimate of the market value of the entire Hotel Complex in 1981 and 9.8% in 1982. Mr. Hardy's estimate of the value of furniture, fixtures and equipment is 16.57% of his estimate of the market value of the entire Hotel Complex for 1981 and 14.44% for 1982.

Mr. Hardy said that he considered two other methods to value the furniture, fixtures and equipment besides the method described in his report. First he attempted to determine if there were industry standards to indicate the percentage that the value of furniture, fixtures and equipment is of the total market value of the hotel or motel when sold or constructed. According to Mr. Hardy, there are no industry standards but conversations he had with personnel in the hotel and motel industry indicated that when a hotel or motel is sold or constructed, the value attributed to furniture, fixtures and equipment is in the range of 15 to 30% of the market value of the hotel or motel.

The other method he considered was based on the replacement cost of the furniture, fixtures and equipment. According to Mr. Hardy, hotel and motel industry standards indicate that the average life of furniture, fixtures and equipment is nine years before replacement. Assuming a cost of $7,500.00 to furnish a room, Mr. Hardy said it would cost $2,497,500 ($7,500.00 x 333 rooms) to refurnish the Lord Nelson Hotel at the end of nine years. Mr. Hardy discounted this value by 16%, which was the bank borrowing rate around the time the assessments were prepared, which produced a figure of $142,563.00 which represents how much money per year the company must put in the bank to have enough funds to replace the furniture, fixtures and equipment in nine years. Mr. Hardy capitalized the sum of $142,563.00 at an 18.5% capitalization rate. The 18.5% capitalization rate is approximately the same rate used by him to capitalize the hotel's income for valuation purposes. This then, produced an indication of value for furniture, fixtures and equipment of approximately $770,000.00. According to Mr. Hardy, both estimates of $750,000.00 and $770,000.00 for the market value of furniture, fixtures and equipment fall within the range of

15-30% of the market value of the hotel. Mr. Hardy however, relies most heavily on the method outlined in his report for his estimate of the value of furniture fixtures and equipment.

Another method used to value furniture, fixtures and equipment is the depreciated replacement cost method which is described in the textbook "Real Estate Investment Analysis and Valuation, Second Edition" by Lincoln W. North, an extract of which was filed as Exhibit L-34. At Page 114 of this text, Mr. North states:

> " When the net operating income of a hotel or motel is converted into an expression of capital value, through application of a capitalization rate or a price-earnings ratio, the resulting figure represents the value of the land, the buildings, the fixtures, furniture and equipment (operating chattels) which are an integral part of the hotel operation and possibly a business component, or goodwill. If the final price must be allocated between the three categories of fixed assets, it is suggested that the net book value of the fixtures, furniture and equipment will fairly represent their market value."

Mr. Hardy did not agree with the above statement of Mr. North. Both he and Mrs. McCluskey said that this method is not appropriate because many hotels or motels depreciate the cost of their furniture, fixtures and equipment at maximum allowable rates permitted by regulations under the Federal Income Tax Act with the result that the depreciated cost of the furniture, fixtures and equipment as shown in their accounting records is either very low or reduced to zero and therefore, in most cases, would not reflect their market value.

The Board is not prepared to endorse the method suggested by the Director of Assessment to value furniture, fixtures and equipment. In the opinion of the Board, while the method may have the benefit of making the work of the assessor easier, there does not appear to be any valid basis for its use. In the opinion of the Board, it is not possible with any degree of reliability to measure the income contribution which furniture, fixtures and equipment make to the overall hotel income. The choice of a rate of 15% to apply to the base capitalization rate by Mrs. McCluskey is completely subjective and in the opinion of the Board, will not lead to a reliable estimate of the income contribution of furniture, fixtures and equipment to the overall hotel income.

In the opinion of the Board, a more appropriate method to determine the market value of the hotel property excluding furniture, fixtures and equipment is to estimate by accepted appraisal methods the market value of the furniture, fixtures and equipment and to subtract that value from the market value of the hotel property including furniture, fixtures and equipment.

Aside from the estimate of the market value of furniture, fixtures and equipment by Mrs. McCluskey, the only other estimate of the market value of furniture, fixtures and equipment before the Board is Mr. Hardy's estimate of $750,000.00. The Board accepts his estimate of market value as a reasonable estimate of the market value of the furniture, fixtures and equipment of the Lord Nelson Hotel for 1981 and 1982. Because of the similiarity of the Hotel Nova Scotian with the Lord Nelson Hotel in terms of age, style, construction, number of rooms and facilities, in the opinion of the Board it is reasonable to estimate the per room cost of furniture, fixtures and equipment for the Lord Nelson Hotel by applying the per room value of the furniture, fixtures and equipment of the Hotel Nova Scotian which value was obtained by Mr. Hardy as the result of information he obtained when the Hotel Nova Scotian was sold in 1981. According to the uncontradicted testimony of Mr. Hardy, the market value of furniture, fixtures and equipment as a percentage of the market value of an hotel is in the general range of 15-30%. His estimate of $750,000.00 falls within this range and therefore appears to be a reasonable estimate of the market value of furniture, fixtures and equipment for the subject property.

In the opinion of the Board, in determining the market value of furniture, fixtures and equipment it is necessary for the assessor to consider many factors including the cost of the furniture, fixtures and equipment, the methods used to depreciate the cost and the remaining useful life of the furniture, fixtures and equipment. In some instances, the depreciated replacement cost may be a reasonable estimate of the market value of the furniture, fixtures and equipment while in other instances it may not. In the opinion of the Board, the market value of each hotel or motel must be separately determined by the assessor and so must the market value of the hotel's furniture, fixtures and equipment.

In determining the assessed value of the total Hotel Complex for 1981 and 1982, the Board accepts the revenue, expense and net income figures of the Director of Assessment for both the hotel part of the total Hotel Complex and the commercial part of the total Hotel Complex which have been quoted at Page 18 of this decision. The Board is of the opinion that an appropriate capitalization rate for the hotel part of the total Hotel Complex is .1919 for 1981 and .1814 for 1982. These rates are calculated by subtracting the rate the Director used for furniture, fixtures and equipment (.0210) from the composite capitalization rate of .2129 in 1981 and .2064 in 1982. The Board accepts the Director's capitalization rate of .1817 for 1981 and .1765 for 1982 for the commercial part of the Hotel Complex. These rates were previously quoted at Page 27 of this decision. The Board accepts Mr. Hardy's estimate of $750,000.00 as the value of furniture, fixtures and equipment.

The Board determines the assessed value of the Hotel Complex for the 1981 and 1982 assessment years as follows:

(a) Hotel Complex including the Hotel, three parking lots, Victory Lounge and Lord Nelson Beverage Room but excluding the space occupied by the Royal Bank, Lawton's Drug Store and United Cigar Store

	1981	1982
Revenue	3,875,532	4,448,330
Expense	2,930,768	3,421,581
Net Income	944,764	1,026,749
Capitalization Rate	.1919	.1854
Value including furniture, fixtures and equipment	4,923,210	5,538,020
LESS: Value of furniture, fixture and equipment	750,000	750,000
ESTIMATE OF VALUE	4,173,210	4,788,020

(b) Space occupied by Royal Bank, Lawton's Drug Store and United Cigar Store

	1981	1982
Revenue	180,723	182,820
Expense	45,180	45,705
Net Income	135,543	137,115
Capitalization Rate	.1817	.1765
ESTIMATE OF VALUE	745,971	776,856

(c) Final Estimate of Value

	1981	1982
(a) Hotel Space	4,173,210	4,788,020
(b) Commercial Space	745,971	776,856
	4,919,181	5,564,876
General Level of the Roll	93.3	80.3
Assessed Value	4,589,596	4,468,595
Rounded to	4,589,600	4,468,600

When the Director of Assessment prepared the 1981 and 1982 Assessment Rolls, the hotel and the three parking lots were entered on the roll as four separate "pieces of assessable property" each with its own classification and value. The Appellant appealed the assessments relating to each of these four "pieces of assessable property." On appeal, the Judge of the Regional Assessment Appeal Court decided that the parking lots should be valued as part of the hotel. He then struck from the 1981 and 1982 Rolls the assessments relating to the three parking lots. Counsel for the Director and the City asked the Board to reverse the decision of the Regional Assessment Appeal Court to strike the assessment of the three parking lots from the 1981 and 1982 Assessment Rolls.

They agree with the decision of the Regional Assessment Appeal Court to include the value of the three parking lots as part of the value of the hotel complex for assessment purposes. However, they submit that the assessment of the three parking lots can't be struck from the roll altogether because the value of the parking lots must be included in the roll.

Counsel for the Company agrees that only one value for assessment purposes should be determined for the three parking lots and the hotel. Counsel for the Company did not make any representation with respect as to how the assessments of the parking lots should be shown on the Assessment Roll.

Counsel for the Director and the City at Page 8 of their joint post-hearing brief, suggest three possible ways in which to deal with this matter:

> "1. There could be one value for the total complex which includes commercial and hotel sections as well as parking area with one account number. This would be one "property to be assessed", one "separate piece of assessable property" as anticipated under section 23 of the Act.
>
> 2. There could be five separate account numbers, but only one account number would include the value for the entire complex. The other four account numbers could indicate "value included under account number x." This would show that there are five legal descriptions, but one piece of assessable property or that the value could not be separated or that the value of the whole complex was different than the value of each separate legal description plus those parts of the realty physically situate on or above the original lot."
>
> 3. There could be one value determined for the entire complex, but that value arbitrarily divided among the five legal descriptions.

In the opinion of the Board, the three parking lots and the hotel should be considered one "piece of assessable property" within the meaning of Section 23(a) of the Assessment Act with a commercial classification and having one value for both the 1981 and 1982 assessment years. The Board therefore determines the classification of the subject property to be commercial and determines the assessed value of the subject property for 1981 to be $4,589,600.00 and for 1982 to be $4,468,600.00.

Considering the mixed success of the parties and the fact that several issues of general application were decided, the Board is not prepared to award costs to any of the parties.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia this 14th day of September, A.D., 1984.

RHBlois

R.H. BLOIS, Chairman

EALawrence

ELIZABETH LAWRENCE, Vice-Chairman

Darryl Wilson

DARRYL W. WILSON, Member

Knickle v. Director of Assessment

ASSESSMENT--RESIDENTIAL--JURISDICTION--FAILURE TO SERVE CLERK OF MUNICIPALITY WITH NOTICE OF APPEAL--FAILURE OF RECORDER TO SERVE APPELLANT BY REGISTERED MAIL--ASSESSMENT ACT, Ss. 90, 100(1), 188(1)--INTERPRETATION ACT, S. 6(1)(2)

This is an appeal from a decision of the Regional Assessment Appeal Court, Lunenburg Region, which confirmed the assessment of the Appellant's residential property. The Director took the position on the present appeal that the Board was without jurisdiction because s. 100(1) of the Assessment Act had not been complied with in that the Clerk of the Municipality in which the property was situate was not served with a Notice of Appeal. Section 100(1) requires the Notice of Appeal to be served within thirty days from the day when notice of the decision of the regional assessment appeal court was received on, inter alia, "the clerk of the municipality or town in which the property is situate".

HELD--The Board dismisses the appeal for lack of jurisdiction, without costs.

It is noteworthy that the Recorder of the Regional Assessment Appeal Court sent a copy of the Regional Court's decision by ordinary mail to the Appellant at his residence in New Jersey, U.S.A. rather than by registered mail as s. 90 of the Assessment Act requires. The failure of the Recorder to send the Notice by registered mail does not constitute an irregularity making the Notice a nullity. The Appellant did in fact receive Notice of the Regional Court's decision and was in no way prejudiced by the fact that the Notice was sent by ordinary mail.

Here the Appellant is an elderly person whose age appears to be in the vicinity of 80 years and who appeared at the hearing carrying a white cane, escorted by a friend. The Board does not have any power to grant relief from the Appellant's failure to comply with the strict requirements of s. 100(1), but if it had such power or authority, relief would have been granted.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act,
R.S.N.S. 1967, c. 14;

- and -

IN THE MATTER OF: An Appeal by the REVEREND DR. H.J. KNICKLE from a decision of the Regional Assessment Appeal Court, Lunenburg Assessment Region dated March 27, 1984, confirming the assessment of the Appellant's residential property situate at Conquerall Bank in the County of Lunenburg.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: The Appellant, The Reverend Dr. H.J. Knickle appeared on his own behalf,

MARIAN F. TYSON, LL.B, for the Director of Assessment.

DECISION

This is an appeal by the Reverend Dr. H.J. Knickle, under s.s. (1) of Section 100 of the Assessment Act, R.S.N.S. 1967, c. 14, from the decision of the Regional Assessment Appeal Court, Lunenburg Region, dated March 27, 1984, which decision confirmed the assessment of the Appellant's residential property situate at Conquerall Bank in the County of Lunenburg. The Appeal was heard by the Board on June 14, 1984, in the Council Chambers of the Municipality of the District of Lunenburg in the Town of Bridgewater.

The Appellant resides at Lakewood, in the State of

New Jersey, U.S.A. His Notice of Appeal in letter form is dated April 5, 1984, and was received by the Board on April 12, 1984, and is filed as Exhibit K-1.

Counsel for the Director of Assessment wrote to the Board on May 14, 1984, with a copy to the Appellant stating that "It is our understanding that Reverend Knickle has failed to serve the Clerk of the Municipality of the County of Lunenburg with Notice of Appeal. Therefore, we would ask that any hearing set down will be preliminary only, until the Board determines whether it has jurisdiction to hear the merits of the appeal".

Counsel for the Director forwarded to the Board by letter dated June 7, 1984, copies of two Affidavits both sworn to on May 29, 1984 and marked at the time of the hearing as Exhibits K-2 and K-3. Exhibit K-2 is the Affidavit of David E. Steele, the Clerk and Chief Administrative Officer for the Municipality of the District of Lunenburg. Attached to his Affidavit is a copy of the Appellant's Notice of Appeal received by the Board on April 12, 1984. He states that he was not served with a copy of the Appellant's Notice of Appeal.

Exhibit K-3 is the Affidavit of Donna Brown the Recorder for the Lunenburg Assessment Region. Attached to her Affidavit is a true copy of the Regional Assessment Appeal Court's decision dated March 27, 1984, relating to the Appellant's property. She states that she received the decision on March 27, 1984, and mailed a copy of it to the Appellant "on March 29, 1984, by ordinary mail at the address for service given on the Notice of Appeal to the Regional Assessment Appeal Court." Her Affidavit states that she also mailed to the Appellant an information sheet respecting appeals from decisions of the Regional Assessment Appeal Court a copy of which is attached to her Affidavit as Schedule "B".

Paragraphs 7, 8, 9, 10 and 11 of the Affidavit of Donna Brown read as follows:

> "7. THAT on April 18, 1984, I was advised by the Solicitor for the Director of Assessment that she had accepted service on behalf of the Director of Assessment and myself;
>
> 8. THAT on April 19, 1984, I telephoned Dr. Knickle and advised him that the departmental solicitor had accepted service of his Notice of Appeal on behalf of the Director of Assessment and the Recorder, but that he was required to serve the Clerk of the Municipality of the County of Lunenburg within the time period specified in the Assessment Act;
>
> 9. THAT Dr. Knickle advised me that he would be in Lunenburg in two weeks and that it was his intention to serve the Clerk of the Municipality of the County of Lunenburg upon his arrival in Lunenburg;
>
> 10. THAT I advised Dr. Knickle that in my opinion in two weeks the time period may be expired for filing Notice of Appeal;
>
> 11. THAT attached as Schedule "C" is a copy of a letter from myself to Dr. Knickle dated April 19, 1984, in which I again advised him that the Clerk of the Municipality of the County of Lunenburg was required to be served;"

At the commencement of the hearing Counsel for the Director informed the Board that copies of the Affidavits filed as Exhibits K-2 and K-3 had been sent to the Appellant. Counsel for the Director stated that the Director's position was that the Appellant had not complied with the provisions of Section 100(1) of the Assessment Act in that the Clerk of the Municipality in which the property is situate was not served by the Appellant with a Notice of Appeal and therefore the Board does not have jurisdiction to hear the appeal on the merits. Subsection (1) of Section 100 of the Assessment Act reads as follows:

> "Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise."

Counsel for the Director then referred to the two Affidavits filed as Exhibits K-2 and K-3 in support of her contention that the provisions of s.s. (1) of Section 100 had not been complied with.

It is noteworthy that Donna Brown the Recorder of the Regional Assessment Appeal Court sent a copy of the Regional Court's decision to the Appellant on March 29, 1984 by ordinary mail and not by registered mail.

Section 90 of the Assessment Act states as follows:

> "Within three days after a decision by the Court, the recorder shall give written notice to the clerk, the Appellant, the respondent and any occupier of the property assessed an occupancy assessment by personal service or registered mail to the Appellant at the address for service given on the notice of appeal and to the respondent and any occupier of the property assessed an occupancy assessment at his usual or last place of residence or business or if no such address is known to the recorder, then by posting it in a conspicuous place on the property."

Counsel for the Appellant admitted that the Regional

Court's decision was not correctly served on the Appellant initially "but that he actually did receive it and the time period within which the person is required by Section 100 must be served has not been met even from the time that we knew he had it in his possession".

Counsel for the Director pointed out that under the provisions of Section 6(1)(2) of the Interpretation Act, R.S.N.S. 1967, c. 151 "registered mail" in any enactment includes "certified mail". However, in this appeal it is clear that the decision was sent to the Appellant by "ordinary mail" not registered or certified mail.

The Appellant informed the Board that he had not read the two Affidavits but he assumed that they were truthful. He stated that there is no certified mail between Canada and the U.S.A. but there is registered mail. He stated he could not be certain when he received the decision as he doesn't "keep a record of every letter I get every day". He did state that "I am not objecting that I have not met the qualifications, I understand them now, they have been explained. I haven't met the qualifications but let me say this. Why should anybody have to notify five people in regard to a simple thing. I notified you the Chairman of the Halifax Provincial Board. I notified the Director of Assessment in Lunenburg, then I had to notify all of these other people and declare to all the bureaucrats in the County of Lunenburg. That's just a remark. I know it is your regulations and I think that Act is one of the stupidest statutes I ever heard of anyway".

The Appellant was asked by the Board if he received a telephone call from Donna Brown as alleged in paragraph 8 of her

Affidavit, advising him that he was required to serve the Clerk of the Municipality with a copy of his Notice of Appeal within the time period specified in the Assessment Act. The Appellant admitted receiving a telephone call advising him that he had to serve the Clerk of the Municipality with a copy of the Notice of Appeal. He could not state whether he received the call on April 19th or not.

It is the opinion of the Board that the Appellant has failed to comply with the requirements of s.s.(1) of Section 100 of the Assessment Act in that he did not serve a copy of his Notice of Appeal on the Clerk of the Municipality of the District of Lunenburg. The Board accepts the Affidavit evidence of Donna Brown as stated in paragraph 7 of her Affidavit that Counsel for the Director had on or before April 18, 1984, accepted service of the Notice of Appeal on behalf of the Director of Assessment and on behalf of the Recorder.

The Board mailed a photocopy of the Appellant's Notice of Appeal to Counsel for the Director by letter dated April 13, 1984, along with a copy of a letter dated April 13, 1984, from the Board to the Appellant acknowledging receipt of the Notice of Appeal and advising the Appellant that his appeal would not be heard by the Board prior to May 8th when the Appellant indicated he would be returning to Nova Scotia. The letter from the Board to the Appellant stated that his appeal would not be set down for hearing until the Board had contacted him as to a suitable date for the hearing.

It is clear that the Appellant's Notice of Appeal filed as Exhibit K-1 was received by the Board well within the

30 day appeal period set out in s.s. (1) of Section 100 of the Assessment Act. Although it is not clear when the Appellant actually received a copy of the Regional Court's decision which is dated March 27, 1984, the Appellant mailed his Notice of Appeal dated April 5, 1984, which was actually received by the Board on April 12, 1984.

The Board notes that under the provisions of Section 90 of the Assessment Act the recorder is required to give written notice of the Regional Court's decision to the Appellant by "registered mail" at the address for service given on the Notice of Appeal. The Recorder did not fully comply with the requirements of Section 90 in that she gave the notice by means of ordinary mail rather than registered mail. This failure of the Recorder to send the Notice by registered mail does not in the Board's opinion constitute an irregularity which would have the effect of making the Notice a nullity. The Appellant did in fact receive Notice of the Regional Court's decision and he was in no way prejudiced by the fact that the Notice was sent by ordinary mail rather than registered mail.

Counsel for the Director referred the Board to Section 188(1) of the Assessment Act which provides that no error, informality or irregularity on the part of the Recorder and "no error or omission in giving any Notice required by this Act to be given, shall affect or prejudice the validity of any general or individual assessments made or of any rate rated, distrained for or collected."

In a number of previous decisions of this Board the Board denied jurisdiction to hear an appeal under the Assessment

Act where it was clear that the Appellant had failed to comply with the requirements of s.s. (1) of Section 100 of the Assessment Act in not serving one or more of the persons on whom service of the Notice of Appeal is required.

In the present case because the Appellant failed to serve a copy of his Notice of Appeal on the Clerk of the Municipality he has not met the strict requirements of s.s. (1) of Section 100 of the Assessment Act.

It is to be noted that the Appellant is an elderly person whose age was not given but who would appear to be in the vicinity of 80 years old. He appeared at the hearing carrying a white cane and was escorted by a friend. It is the opinion of the Board that the Board does not have any power to grant relief to the Appellant so that his appeal could be heard on the merits but if it had such power or authority it would have been granted.

The Board because it is satisfied on the evidence that there has been non-compliance by the Appellant with the provisions of s.s. (1) of Section 100 of the Assessment Act relating to the service of the Notice of Appeal is unable to assume jurisdiction to hear the appeal on the merits.

The Board therefore dismisses the appeal for lack of jurisdiction without costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 26th day of October, A.D., 1984.

RHBlois

R.H. BLOIS, Q.C.,
CHAIRMAN, NOVA SCOTIA MUNICIPAL

BOARD.

Malcolm F. DeMille v. Director of Assessment

ASSESSMENT--RESIDENTIAL--MARKET VALUE--COST APPROACH--MARKET APPROACH

This is an appeal from a decision of the Regional Assessment Appeal Court, Yarmouth-Clare Region which reduced the 1984 assessment on a residential property on Scott Road, Dayton from $65,000.00 to $62,000.00. The subject property is approximately 8 acres in size, located about 2½ miles north of the Town of Yarmouth, with a 1,100 sq. ft. house and a 1,008 sq. ft. barn. High tension power lines cross the property through a Nova Scotia Power Commission easement running between the house and barn. The Appellant's wife stated that $58,000.00 or $59,000.00 would be a more appropriate assessment because of the devaluing effect of other properties in the area. The Appellant in cross-examination said "$62,000.00 would be all I would want to pay for it", and that $62,000.00 would be the best price he could get for the subject property. The assessor in establishing the value of the property for assessment purposes used both the reproduction cost approach and the market data approach.

HELD--The appeal is dismissed without costs. The decision of the Regional Assessment Appeal Court is confirmed.

The Appellant has not discharged the onus on him of proving that the assessor's opinion of value is incorrect. While objecting to some component estimates of value in the assessor's evidence, the Appellant could not quantify the individual amounts by which each such specific item should be reduced. The Appellant did not put forward a convincing case. The evidence of the assessor appears credible in method and in conclusions.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, Chapter 14, as amended;

- and -

IN THE MATTER OF: An appeal by Malcolm F. DeMille from a decision of the Regional Assessment Appeal Court, Yarmouth-Clare Region, respecting his property at Dayton, in the Municipality of the District of Yarmouth.

BEFORE: ELIZABETH LAWRENCE, Vice-Chairman

COUNSEL: MALCOLM F. DEMILLE without Counsel appearing on his own behalf.

WILLIAM M. WILSON, LL.B., for the Director of Assessment

DECISION

The Board held a hearing at the Court House, Yarmouth, on May 15, 1984, into an appeal by Malcolm DeMille dated April 15, 1984 (Exhibit D-1) and received by the Board April 18, 1984, from a decision of the Regional Assessment Appeal Court, Yarmouth-Clare Region, dated March 30, 1984, which reduced the 1984 assessment on a residential property on Scott Road, Dayton, jointly owned by Malcolm F. and Beverley DeMille from $65,000.00 to $62,000.00.

Both Mr. and Mrs. DeMille gave evidence. Counsel for the Director called the assessor, Mr. Richard Pitman, as his only witness.

The subject property is located in District 3 of the Municipality of the District of Yarmouth on the south side of the Scott Road, in the community of Dayton, about 2 1-2 miles north of the Town of Yarmouth. The property is approximately 8 acres in size with a frontage on the Scott Road of 1,135 feet. A house containing 1,199 square feet and a barn containing 1,008 square feet are located on the subject property. High tension power lines cross the property through a Nova Scotia Power Commission easement running between the house and the barn. The property has a dug well and a septic tank and disposal field.

Beverley DeMille gave evidence about her opinion of value of the subject property and commented on the appraisal report (Exhibit D-2) prepared by the assessor and circulated to the parties in advance of the hearing.

Mrs. DeMille was of the opinion that $58,000.00 or $59,000.00 would be a more appropriate assessment because of the devaluing effect of other properties in the area. She stated that a letter from an appraiser which she and her husband had submitted as evidence at the Regional Assessment Appeal Court concluded that the amount of $58,000.00 - $59,000.00 would be a proper value for assessment purposes of the subject property. The letter was not filed in evidence with the Board.

Mrs. DeMille submitted two photographs taken by her in early April of this year showing properties across the Scott Road from the subject property. Exhibit D-3 is a photograph of of the Brian Thibault property located across the road and slightly to the east of the DeMille house. Exhibit D-4 is a photograph of a vacant lot across the road and to the west of the DeMille house. Mrs. DeMille stated that she felt that the vehicles and equipment on the Thibault property and the old collapsing foundation and used lumber piled on the vacant lot contributed to a neighbourhood which lowered the value of the subject property.

Mrs. DeMille stated that she believed that her home had six rooms rather than the seven which the assessor reported in Exhibit D-2. She felt that the assessor's valuation of the barn ($12,000.00) was too high because it had been built 5 years previously at a cost of just over $6,000.00. Mrs. DeMille disagreed that the soil on the subject property was "suitable for growing trees" as stated by the assessor in his report, because an extensive rock ledge near the house made it very difficult to grow trees in that area.

Mr. DeMille agreed with his wife that some properties in the neighbourhood lowered the value of his property. When questioned by the Board, Mr. DeMille stated that the vacant lot across the road had been "bad" for three years and that the Thibault property was in a state similar to its present condition when Mr. and Mrs. DeMille built their house on the other side of the road in 1974. Mr. DeMille agreed in cross-examination that between the Thibault property and the vacant lot, whose condition he felt lowered the value of his property, was a property belonging to Kenneth Buxton. Mr. DeMille stated that the Buxton's house was very well kept and that the property was entirely satisfactory to him and in no way lowered his own property value.

Asked by the Board and by Counsel for the Director in cross-examination if $62,000.00 was not a fair assessment for his property what he would consider more appropriate, Mr. DeMille said"$62,000.00 would be all I would want to pay for it", and that $62,000.00 would be the best price he could get for the subject property.

Counsel for the Director called Mr. Richard Pitman, the Senior Assessor in the Yarmouth-Clare assessment region who is responsible for assessing residential, industrial and commercial properties in the Municipality of the District of Yarmouth. His appraisal report filed as Exhibit D-2 concludes that the market value of the subject property for assessment purposes as of January 1, 1983, was $62,000.00. The assessor used the market data approach using 3 lot sales as comparables to establish an estimate of value of the land in the subject property. To establish the value of the property for assessment purposes the assessor used both the reproduction cost approach and the market data approach.

Mr. Pitman used three recent land sales to establish an estimate of land value for the subject property. Lot #1, on the south side of Mill Road in Brooklyn, sold for $4,800.00 in July 1980. Lot #2, on the west side of the Brooklyn Road, sold for $3,500.00 in June, 1981. Lot #3, on the south side of Scott Road, Dayton, sold for $3,000.00 in August, 1978. The assessor adjusted these sales prices for time on the basis that rural unserviced lots had increased in value by an average of five percent per year in the past three years according to the data available to the assessment department. After further adjustments for the physical state of the lots and the amount of road frontage, Mr. Pitman arrived at an "adjusted selling price per front foot" for the 3 comparable lots which ranged from $34.24 to $37.55. The assessor concluded that an appropriate value for the subject property would be $35.00 per foot front.

In calculating the land value of the subject property the assessor valued the portion of the property related to the residence according to its foot frontage value as previously established thus:

150 feet frontage @ $35.00/foot front = $5,250.00
rounded to $5,000.00.

The land additional to the "residence lot" is approximately 7½ acres. The assessor divided the frontage of that land into two parcels. He valued 200 feet from the "house lot" along Scott Road to the eastern boundary of the property, on which are located the barn and the Nova Scotia Power Corporation easement, at $15.00 per foot front because of the restricted use possible on that land, which in his experience with sales prices he believed would lower the value of that land. The remaining 785 feet of frontage were valued at $1.00 per foot front because it was "low and swampy." The frontage over and above the residential lot was then valued as follows:

200 feet @ $15.00/foot front = $3,000.00
785 feet @ $1.00/foot front = $ 785.00

In addition the back-up land (any land over 200 feet in depth from the road) was valued at $50.00 per acre as follows:

3 acres @ $50.00/acre = $150.00

The total land value as vacant as calculated by the assessor is the total of $5,000 + $3,000.00 + $785.00 +$150.00 = $8,935.00 which he rounded to $8,900.00. The site improvements to the land which consist of a dug well and septic system the assessor valued at $500.00 and $1,000.00 respectively for a total of $1,500.00. In valuing the buildings on the site by the cost approach, the assessor used the Nova Scotia Assessment Manual which is based on Boeckh's valuation data and cost systems for the house and the Boeckh Valuation Agricultural Manual (Second Edition) for the barn. Using the Manuals, he calculated the estimated cost new of the house to be $49,590.00 (1199 square feet x $41.36) and the estimated building cost new of the barn to be $16,108.00 (1008 square feet x $15.98).

The assessor adjusted the value of both the house and barn for physical depreciation by allowing 10% on the house and 15% for the barn. To both house and barn he applied a 10% economic obsolescence or "locational zone" allowance because of the distance of the subject property from the Town of Yarmouth where property values are higher. He considered that there was no functional obsolescence in either building.

After the deductions for physical depreciation and locational zone the total cost of the house was $40,168.00 and the total cost of the barn was $12,322.00, which together total $52,490.00. Added to that was the total cost of the land ($8,900.00) and the total cost of site improvements ($1,500.00) producing a value indicated by the cost approach for the subject property of $62,890.00, rounded by the assessor to $62,900.00.

To estimate the value of the subject property by the market value approach the assessor chose 4 recent sales no further than 6 miles away from the subject as suitable properties for the purpose of comparison. Sale #1, on the east side of Highway 340 in South Ohio, was sold in July, 1983 for $65,000.00. Sale #2, also on the east side of Highway 340 in South Ohio, was sold in November, 1980, for $49,000.00. Sale #3, on the north side of Pitman Road in South Ohio, was sold in June 1980 for $48,000.00. Sale #4, on the south side of Mill Road in Dayton, was sold in December, 1980, for $54,000.00.

The assessor adjusted the sales prices for all four comparables to reflect the features which are different from the subject property by the "plus and minus dollar adjustment method". Adjustments were made as necessary for time of sale, location, land size, living area, age and condition, quality of construction, heating, fireplace, basement finish, plumbing and out buildings. When all adjustments had been calculated, Sale #1 remained the same at $65,000.00; Sale #2 increased in value from $49,000.00 to $63,900.00; Sale #3 increased in value from $48,000.00 to $60,300.00; and Sale #4 increased in value from $54,000.00 to $62,000.00.

The adjusted sales prices of the 4 comparables ranged from $60,300.00 to $65,000.00.

The assessor, "after weighing all of the known factors affecting the comparable sales, and the state of the present market in the Municipality of Yarmouth", estimated the value of the subject property by the market approach to be $62,000.00.

In correlating the value indicated by the cost approach ($62,900.00) and the value indicated by the market approach ($62,000.00), the assessor gave lesser weight to the value indicated by the cost approach because of the subjective nature of the depreciation applied to the house and barn on the property which are 8 and 5 years old respectively. The final estimate of value then is that indicated by the market approach - $62,000.00.

Against the evidence of the assessor which appears to the Board to be credible in method and in conclusions, the Appellant did not put forward a convincing case for the reduction of the assessment of the subject property. While objecting to some component estimates of value in the assessor's evidence, neither the Appellant nor his wife could quantify the individual amounts by which each such specific item should be reduced. The Appellant agreed that the subject property had increased in value since the last reassessment but not by the amount determined by the assessor.

In the opinion of the Board, the Appellant has not discharged the onus on him of proving that the assessor's opinion of value of the subject property is incorrect. The Board therefore confirms the decision of the Regional Assessment Appeal Court and dismisses the appeal without costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 30th day of October, 1984.

EALawrence

ELIZABETH LAWRENCE
Vice-Chairman

Conrad v. Director of Assessment

ASSESSMENT--RESIDENTIAL--VALUATION--MARKET VALUE--RECENT SALES COMPARISON--COST APPROACH--NOVA SOCTIA RESIDENTIAL ASSESSMENT MANUAL--ASSESSMENT ACT, S. 38

This is an appeal from a decision of the Regional Assessment Appeal Court, Lunenburg Region which set the 1984 assessment of the Appellant's residential property at Branch LaHave, Lunenburg County at $38,900.00. The property is on a dead end road approximately seven miles from Bridgewater. It consists of about 20,000 sq. ft., with a dwelling house, and a mobile home attached to the dwelling house. The lot has a septic system but does not have a well. Water is received through a line connected to a drilled well on the Appellant's mother's property, for which he does not have an easement. The house has a basement, a main floor of 768 sq. ft., a top level of 464 sq. ft. and is still under construction. The mobile home rests on cement blocks and has a partial basement under it. The Appellant estimated the market value at $35,000.00. Both the assessor and the Appellant agree that the value of the mobile home is $10,246.00.

HELD--The Board dismisses the appeal and confirms the assessment at $38,900.00. There will be no award as to costs.

The Board agrees that the properties used by the assessor in his direct sales comparison method are not comparable properties. His estimate based upon it is not a reliable estimate and should be given no weight. The assessor did not rely conclusively on this method but used it to reinforce his estimate of value by the cost approach. Because a mobile home is attached to an unfinished dwelling it is difficult to find recent sales of comparable properties. Therefore the cost method used by the assessor is the most appropriate. The assessor properly costed the subject property as a storey and a half dwelling using the reproduction costs taken from the Nova Scotia Residential Assessment Manual. He has taken into account the loss in market value of the subject property due to its location by reducing the reproduction cost by 15%. The assessor's allowance of a 20% reduction in the cost is a reasonable estimate of the unfinished state of the dwelling. The Appellant did not provide his own estimate of cost to complete and in the absence of any evidence to the contrary the Board is not prepared to substitute its opinion for that of a qualified assessor. The assessor's estimate of market value is based on the subject property being without a well; the assessor does not value wells for assessment purposes. Because of this, properties which have wells are not being valued at market value in accordance with s. 38 of the Assessment Act. Incorrectly valued properties should be adjusted to their market value but this is not a reason to reduce the market value of the subject property. While there is a lack of uniformity in the assessment of properties in the municipality by this assessor, there is not evidence of the practice of other assessors. There is not sufficient evidence before the Board to enable it to determine a general level of assessment for properties in the municipality and therefore the Board is not able to conclude that other properties have a lower ratio of their assessed value to their market value than the Appellant's. The Appellant has not discharged the onus on him of proving that the assessment value is too high.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by Aubrey Conrad from the decision of the Regional Assessment Appeal Court, Lunenburg Assessment Region, made March 20, 1984, respecting residential property located at Branch LaHave, Lunenburg County.

BEFORE: DARRYL W. WILSON, C.A., LL.B, Member.

COUNSEL: The Appellant, Aubrey Conrad, was not represented by Counsel;

W.M. Wilson, LL.B. for the Director of Assessment.

DECISION

This is an appeal by Aubrey Conrad from the decision of the Regional Assessment Appeal Court, Lunenburg Assessment Region, made March 20, 1984, by which the 1984 assessment of the Appellant's residential property consisting of land, dwelling house and mobile home located at Branch LaHave, Lunenburg County, was set at $38,900.00.

The Appellant's Notice of Appeal is dated April 10, 1984, and it was received by the Board on April 12, 1984. The Appellant in his Notice of Appeal states:

> "I wish to appeal my assessment under Section 99 of the Nova Scotia Assessment Act. With the assessment notice was a fact sheet explaining how property is assessed. According to this notice it is to be assessed

> at market value which is defined as the approximate price most people would be willing to pay for your property. In my estimation the assessor failed to proven that the assessed value is the price or market value other persons would pay for my property. The factors I wish to present before the Board involve the location of the property, the incomplete structure, the lack of a water supply. My property is different from most others in my neighbourhood in that it is under construction - half mobile and half house.
>
> I do not want to go through all this trouble, I do not want to cause any problems. I gave it much thought and compared my property with others that have been up for sale and sold. The market today is a buyer's market. I really feel my property is over assessed and feel I have no choice but to voice my concern before the Board."

The hearing of the appeal took place in the Council Chambers of the Municipality of the County of Lunenburg on May 28, 1984. Counsel for the Director did not object to the Board's jurisdiction to hear the appeal and the Board assumed jurisdiction to hear the merits of the appeal.

Mr. Conrad appeared as a witness on his own behalf and Mr. Robert Smith appeared as a witness on behalf of the Director of Assessment.

The Appellant's property is located on Whynott Road, a dead end road, which runs in an easterly direction from the Lower Branch Road, a main secondary road, in Branch LaHave, Lunenburg County, approximately seven miles from the Town of Bridgewater.

The lot size of the subject property is 20,000 square feet. The subject lot slopes downward from front to back. According to Mr. Conrad the back end of the lot is wet year-round and water is always dribbling into the basement of his dwelling house. The lot has a septic system but it does not have a well. The dwelling house receives water through a line connected to a drilled well on Mr. Conrad's mother's property which is located opposite the subject property on the Whynott Road. Mr. Conrad does not have an easement over his mother's property which would guarantee him access to the well should she decide to sell her property. Mr. Conrad stated that in order for him to get water on his property he would have to drill a well through bedrock a distance of approximately 200 feet. Based on his knowledge of the cost of drilling the well on his mother's property and the cost of drilling the well on his neighbour's property he estimated the cost of drilling a well on his lot to be in the range of $2,000.00 to $3,000.00. The subject property is provided with such services as rural mail delivery, garbage collection, school bus pick-up for elementary and high school children and snow removal. The closest fire station is located in West Northfield, approximately five miles from the subject property. Mr. Conrad stated that despite the above deficiencies his land is "pretty good land".

The Appellant's residence consists of a dwelling house and a mobile home attached to the dwelling house. The dwelling house, which was constructed by the Appellant in 1976, has a basement, a main level with 768 square feet of floor area and a top level with 464 square feet of floor area. The basement of the dwelling house only has three foundation walls. The mobile home rests on cement blocks and there is a partial basement under the mobile home. The ceiling height is 7 foot 2 inches in the basement, 8 feet on the main level and 7 feet on the top level.

The dwelling house is still under construction. The exterior walls on the North and South sides of the dwelling are not finished under the eaves; three of the exterior walls are covered with a temporary siding while the fourth exterior wall is not covered with any siding and there is no finish material around the exterior windows and corner boards. On the inside of the dwelling house, the utility room is to be finished with a sink, cupboard and casing; walls have to be placed over the studding in the entrance to the stairway leading from the main level to the basement and a fourth basement wall has to be installed. Mr. Conrad introduced as Exhibits several photographs showing the unfinished parts of his dwelling. He did not provide the Board with an estimate of the cost to complete the unfinished parts of his dwelling house.

Mr. Conrad stated that if his property was valued for assessment purposes at the price other people would be willing to pay to purchase his property, in his opinion, it was over-valued by the assessor and the Regional Assessment Appeal Court. According to Mr. Conrad, the present residential real estate market is a buyer's market. He said that he examined real estate listings in local newspapers and compared his property with some of the residential property being offered for sale in Lunenburg County. He also compared the assessed value of his property with the asking price and sales price of properties he considered comparable to his property. Mr. Conrad stated that the price being asked for residential property in better locations and condition than his property is less than $38,900.00.

Mr. Conrad also referred to the sale of the Miles Crouse property which he described as a one-storey Kent home in good condition located near the intersection of the Lower Branch Road and the Whynott Road in Branch LaHave. According to Mr. Conrad this property was listed for sale with a real estate broker for two years at $39,000.00 and did not sell. Mr. Conrad stated that the property eventually sold on a foreclosure sale in the fall of 1983, for $30,000.00. Mr. Conrad stated that if the Crouse property which is located on a main secondary road, is completely finished and has its own water supply could only sell for $30,000.00 after being listed for sale for two years, then in his opinion, his property which is located on a dead end road, not finished, and without its own water supply could not sell for $38,900.00.

Mr. Conrad stated that the fact that his property does not have a well means that the market value of the property is less than the market value of similar properties which have a well. Mr. Conrad also said that the location of his property reduces its appeal to potential home buyers and this affects the price people would be willing to pay for the property. He further stated that because the dwelling house is not finished the property would not be as attractive to a potential buyer as a dwelling house which was finished. Mr. Conrad also said that the market of buyers able to purchase his property is limited because of the practice of mortgage lenders not to lend money to people to purchase a property without a water supply.

Mr. Conrad stated that the properties chosen by the assessor to estimate a value for his property by the direct sales comparison method are not comparable to his property and should not have been used by the assessor.

Mr. Conrad disagrees with the assessor's estimate of $38,900.00 as the market value of his property using the cost method. Mr. Conrad stated that the assessor costed his dwelling house as a storey and a half dwelling when in fact he should have costed it as a bungalow with a pitched double gable roof. In Mr. Conrad's opinion a storey and a half dwelling has the same amount of floor area on the top level as the main level but not the same amount of ceiling area. He stated that his dwelling house which has 768 square feet of floor area on the main level and 464 square feet of floor area on the top level does not qualify as a storey and a half dwelling. On cross-examination by Mr. Conrad, the assessor, Mr. Smith, said that if he costed the subject dwelling house as a one storey bungalow the reproduction costs would be approximately $4,000.00 to $5,000.00 lower than the reproduction costs of the subject dwelling house.

Mr. Conrad stated the assessor should have allowed more than a 20% reduction in the cost of his dwelling for the unfinished parts.

Mr. Conrad also disagreed with the assessor's opinion of $3,500.00 for the value of his land. According to Mr. Conrad, his neighbour Mr. Wentzell's lot, which is a one-half acre lot with a drilled well located at the end of the Whynott Road, was assessed in 1984 at $2,000.00. Also according to Mr. Conrad, one-half acre lots located on the Bruhm Road in Branch LaHave, are being sold in the price range of $2,000.00 to $2,500.00 by Mr. Arthur Young. In Mr. Conrad's opinion the value of his land should be closer to $2,000.00 than $3,500.00.

Mr. Conrad stated that he would expect to receive $35,000.00 for his property if it was for sale for a reasonable period of time. He further stated that he would expect to receive $30,000.00 for his property if he had to sell quickly.

Mr. Robert Smith, N.S.I.A., who resides at Fancy Lake, Lunenburg County, is an assessor with the Department of Municipal Affairs, in the Lunenburg Assessment Region. He has been employed as an assessor in Lunenburg County for twelve years. He prepared the assessment report relating to the Appellant's property on behalf of the Director of Assessment, filed as Exhibit C-3.

In Mr. Smith's opinion the market value of the Appellant's property in accordance with Section 38 of the Assessment Act is $38,900.00. Section 38 of the Assessment Act reads as follows:

> "All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

Mr. Smith estimated a value for the subject property using the direct sales comparison method and the cost method.

Mr. Smith stated at page 8 of his report (Exhibit C-3) that the direct sales comparison method "involves comparison of similar properties and adjusting them to the subject property to give an indication of value. This method works best when a number of very similar properties have recently sold."

Mr. Smith analyzed two properties which he considered comparable to the subject property. At page 18a of his report

Mr. Smith states:

> "I compared the subject property with two other recent sales in the area. Sale number one was sold in 1980 as a one-storey dwelling located on the Bruhm's Road at Branch LaHave. Sale number two was sold in 1982 as a one-storey dwelling located in Wileville. Both of these properties are one-storey whereas the subject property is one and one-half storey. Although both of these comparables are single detached residences and do not have mobile homes attached to them, both of these sales indicate the market value for this size and type of home. I feel that these sales reinforce my cost approach of the subject building."

Both of the above-mentioned properties sold in 1982 for $35,000.00. After adjustments to make these properties comparable to the subject property, Mr. Smith arrived at an estimated adjusted sales price for the comparable properties of $39,000.00 and $38,668.00 respectively.

Mr. Smith estimated a market value of $38,900.00 for the subject property using the cost method. According to Mr. Smith the cost method "involves calculating the cost of acquiring a lot and adding the cost of erecting the building on it." In estimating the value of the subject property using the cost method, Mr. Smith estimated a cost for the dwelling house, the mobile home and the land and then added these costs to arrive at a sum which expressed the value of the entire property.

In estimating the value of the dwelling house, Mr. Smith used the Nova Scotia Residential Assessment Manual as a guide. He categorized the dwelling house as a Class 3(b) dwelling which he said was a class comprised of properties constructed with inexpensive materials. Mr. Smith stated that the materials used on the inside of the subject dwelling house were good quality but the exterior siding was inexpensive. Mr. Smith considered the subject property to be a one and a half storey building because there was a stairway leading from the main level to the second level and there was space for a living area on the top level.

Using the cost of a one and one-half storey class 3(b) dwelling taken from the Nova Scotia Residential Assessment Manual and updating the costs which were prepared in 1976 by the use of a costing modifier of 1.70 supplied by Boeckh's Costing Services, Mr. Smith estimated the replacement cost of the dwelling house to be $37,507.00. Mr. Smith applied a rate of 5% to the replacement cost of the dwelling house for physical depreciation. The 5% rate was taken from the normal depreciation guideline table in the Nova Scotia Residential Assessment Manual. The 5% rate represents normal depreciation for a dwelling house the age of the subject dwelling in good repair. Mr. Smith also applied a 20% reduction to the cost of the dwelling house because of the unfinished status of the dwelling. Mr. Smith further reduced the cost of the dwelling by 15% because of its location. Mr. Smith estimated the reproduction cost less depreciation of the dwelling house to be $24,231.00.

Using the Lunenburg Assessment Region Mobile Home Schedule as a guide, which takes its cost and depreciation rates from the Boeckh's Valuation Manual, Mr. Smith estimated the reproduction cost less depreciation of the mobile home to be $10,246.00. He valued the partial basement under the mobile home at $1,000.00.

In estimating the value of the subject land, Mr. Smith relied upon two recent land sales. Both properties sold in 1983. The first sale involved 25,840 square feet of vacant land in

Lower Branch at a price of $5,000.00. The second sale involved 42,000 square feet of vacant land in Branch LaHave at a price of $5,200.00. Mr. Smith reduced the sales price of these properties to account for the difference in size between these properties and the subject property and the increase in market value of these properties because they sold after the effective date for valuing the subject property for assessment purposes. He estimated the adjusted sales price of these properties to be $4,300.00 and $3,700.00 respectively. Mr. Smith also stated that the value he used for all 20,000 square foot residential lots in Branch LaHave was $3,500.00. He also said that Mr. Wentzell's property, which was referred to by Mr. Conrad, was assessed lower than $3,500.00 because it was a quarter-acre property and not a half-acre property.

Adding the dwelling house value of $24,231.00, the mobile home value of $11,246.00 and the land value of $3,500.00, Mr. Smith arrived at a total value for the subject property of $38,977.00 which he rounded to $38,900.00. This value is identical to the valuation set by the Regional Assessment Appeal Court.

Mr. Smith stated that when he is valuing residential property for assessment purposes using the cost method he does not include the cost of a well as part of the value of the property. Mr. Smith stated that the market value of the subject property should not be reduced because it does not have a well because the value determined by the cost method does not include an amount for a well.

In closing argument, Mr. Conrad submitted that the market value of his property should be lower than $38,900.00

because of its location, the lack of a water supply on the lot, and the unfinished status of the dwelling house.

Counsel for the Director of Assessment submits that there is an onus on Mr. Conrad as the Appellant to show that the value of his property is too high. He submits that Mr. Conrad only attempted to whittle away at the assessor's opinion of the value and he did not provide the Board with an independent opinion of value for the subject property. Counsel for the Director further submits that the subject property is an unusual property because the dwelling house is unfinished and a mobile home is attached to the dwelling house. He submits that the assessor's method of determining the market value for the subject property for assessment purposes by the cost method is the proper way of valuing the subject property. He also submits that the assessor by placing the dwelling house in a lower cost classification, allowing a high percentage for the unfinished part of the dwelling, and applying liberal depreciation rates gave the benefit of the doubt to the Appellant in all instances in valuing the subject property.

The Board agrees with Mr. Conrad that the properties used by the assessor in his direct sales comparison method are not comparable with his property. The assessor was required to make too many adjustments to the sales price of these properties to account for differences between these properties and the subject property. In the opinion of the Board, the assessor's estimate of the market value using this method is not a reliable estimate of the market value of the subject property. The Board notes that the assessor did not rely conclusively on the sale of these properties in arriving at his final opinion of the market value of the subject property but he did state that the sales reinforce his estimate of value by the cost approach. In the opinion of the Board, in this instance, because there are so many differences between the subject property and the comparables chosen by the assessor no weight should be given to the assessor's estimate of market value determined by the direct sales comparison method.

The Board agrees with the submission of Counsel for the Director that the Appellant's residential property is different from the normal residential property in that a mobile home is attached to an unfinished dwelling. It is therefore difficult to find recent sales of properties comparable to the subject property which would be of assistance in estimating the market value of the subject property. In the opinion of the Board the cost method used by the assessor is the most appropriate method to value the subject property for purposes of the 1984 assessment.

The difference between the assessor's opinion of the market value of the subject property ($38,900.00) and Mr. Conrad's opinion ($35,000.00) is $3,900.00. Mr. Conrad agreed with the assessor's estimate of $10,246.00 as the value of the mobile home.

The Board agrees with the assessor that the dwelling house should be costed as a storey and a half dwelling. The cost used by the assessor to estimate the reproduction costs of the dwelling house were taken from the Nova Scotia Residential Assessment Manual which describes a storey and a half dwelling house as including a main level and a second level with up to 80% of the living area of the main level. The second level of the subject property has 464 square feet of living area and according to Mr. Conrad there is enough space on this level to finish two rooms. There is also a stairway leading from the main level to the second level.

In the opinion of the Board, the assessor has taken into account the loss in market value of the Appellant's property because of its location by reducing the reproduction cost of the dwelling by 15%.

In the opinion of the Board, the assessor's allowance of a 20% reduction in the cost of the dwelling house is a reasonable estimate of the unfinished state of the dwelling. The Appellant did not provide the Board with his own estimate of cost to complete the dwelling and in the absence of any evidence to the contrary the Board is not prepared to substitute its opinion for that of a qualified assessor.

The Board is of the opinion that the assessor's estimate of $38,900.00 as the market value of the subject property should not be reduced due to the fact that the property does not have a well because $38,900.00 is the assessor's estimate of the market value of the subject property without a well. Presumably, if the subject property had a well, its market value would be higher than $38,900.00.

In the opinion of the Board, because the assessor does not value wells for assessment purposes, properties which have wells are not being valued at market value in accordance with Section 38 of the Assessment Act. In the opinion of the Board, if two properties are identical in all respects except that one property has a well and the other property does not have a well, the market value of the property with a well is greater than the market value of the property without a well. However, the fact that properties with wells may not be assessed at market value by the assessor is not a reason to reduce the market value of the subject property. In the opinion of the Board those properties which are incorrectly valued should be adjusted to their market value.

The Board can readily see why Mr. Conrad would feel that his property is assessed too high in comparison with properties which have a well. The assessor's practice of not including the value of a well in his estimate of the market value of property for assessment purposes means that a property without a well, such as the Appellant's property, is assessed at a higher percentage of its market value than a property with a well. The assessor, by not including the value of a well in his estimate of the assessed value of a property, is not complying with Section 38 of the Assessment Act which states:

> "All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the Town or Municipality."

While the Board would be inclined to reduce the assessed value of the Appellant's property so that the assessed value of the Appellant's property is in the same ratio to its market value as properties with wells, it cannot do so in this instance. There are properties in the Municipality of the District of Lunenburg which are assessed by assessors other than Mr. Smith. There was no evidence before the Board to indicate that the practice of these assessors was to exclude the value of a well in determining the market value of property for assessment purposes. In the opinion of the Board, there is a lack of uniformity in the assessment of properties in the Municipality of the District of Lunenburg prepared by Mr. Smith. However, Section 38 of the Assessment Act refers to uniformity in the assessment of all properties in the Municipality not just uniformity of assessment with respect to some of the properties in the Municipality.

The Appeal Division of the Supreme Court of Nova Scotia has interpreted the meaning of the word "uniformity" as that word appears in Section 38 of the Assessment Act on a number of occasions. In the case of Hebb v. The Town of Lunenburg (1979), 32 N.S.R. (2d.) 427(N.S.C.A.) at page 435, 436, the Court stated:

> "The uniformity that is thus dominant and controlling is not, however, uniformity unrelated to 'actual cash value'. 'Uniformity' is not to be based on some general community or judicial standard of fairness or value or comparability.
>
> The test of uniformity arises where, as Chief Justice Ilsley said in Mindamar, Supra there is a 'general level of assessed values of other properties which bore a lower ratio to the actual cash value thereof than the ratio of the assessed value to the actual cash value of the property whose assessment is complained of."

Also the comments of Chief Justice Ilsley in the case of Moreash v. Municipality of Chester (1961), 28 D.L.R. (2d.) 428, at pages 429 and 430 are particularly relevant:

> "As will be seen, I do not think that the mere fact that the assessor assessed certain other individual properties lower in relation to their actual cash values than he assessed the Appellant's property is ground for allowing the Appellant's appeal. It may be that the other assessments are out of line rather than his. I think a comparison between the assessment of the Appellant's property and those of others would be relevant only if it were shown that the general level of assessment

> of properties in the Municipality were lower in relation to the actual cash value, as defined in the Assessment Act, than the assessment of the Appellant's property.
>
> In assessing the Appellant's property, therefore, it was the assessor's duty to determine its actual cash value, but if, because of the failure of the assessor to discharge his duty with regard to the assessment of other properties in the Municipality a general level of assessment has been established which was below actual cash values by a fairly definite percentage thereof, it would have been the duty of the assessor to discount for purposes of assessment the actual cash value of the Appellant's property to a level which was of the same percentage below its actual cash value."

There is not sufficient evidence before the Board to enable it to determine a general level of assessment for properties in the Municipality for the 1984 assessment year. The Board therefore is not able to conclude that the general level of assessed values of other properties in the municipality for the 1984 assessment year bears a lower ratio to their market value than the ratio of the assessed value of the subject property to its market value. The sole issue in this appeal is the determination of the proper assessment value of the Appellant's property for the 1984 assessment year. While the Appellant has raised some interesting arguments, in the opinion of the Board, he has not discharged the onus on him of proving that the assessment value is too high. The Board is satisfied that $38,900.00 is the proper value of the subject property for assessment purposes for the 1984 assessment year.

The Board therefore dismisses the appeal and confirms the 1984 assessment of the Appellant's property at $38,900.00. There will be no award as to costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 31st day of October, A.D., 1984.

DARRYL W. WILSON

MEMBER, NOVA SCOTIA MUNICIPAL
BOARD.

Mohammed Ali v. Director of Assessment

ASSESSMENT--PARTLY RESIDENTIAL AND PARTLY COMMERCIAL--MARKET VALUE--INADEQUATE INSPECTION--REVISED APPRAISAL--ASSESSMENT ACT, Ss. 38, 100(1)

This is an appeal from a decision of the Regional Assessment Appeal Court, Lunenburg Region which confirmed the 1984 assessment of the Appellant's property used partly for residential and partly for commercial purposes at 586 Main St. in the Town of Mahone Bay at $72,700.00. The Appellant owns a two-storey building on a lot zoned commercial with an 86 ft. street frontage and 150 ft. depth. The main floor is used as a retail clothing and dry goods store and the upper floor is used for residential purposes. The Appellant's assessment had increased 62% from 1983 to 1984. The assessor as a result of his appraisal prepared for this hearing reduced his estimate of value to $60,000.00. On closer inspection he found there was not a partial basement as he had assumed and that the older section of the building needed some minor repairs and so depreciation should be increased from 20% to 30%. An appraisal report prepared for loan purposes had valued the property at $50,000.00 but the appraiser who prepared that report did not appear as a witness.

HELD--The appeal is allowed and the Appellant's 1984 assessment is reduced to $60,000.00. Neither party was seeking costs and therefore the Board makes no award as to costs.

The Appellant's property was assessed for the year 1984 in excess of its market value. The assessor admitted his original assessment was incorrect based on an inadequate inspection. While an appraisal report estimating the value of the subject property as $50,000.00 was introduced, the appraiser did not appear as a witness. The Board is therefore obliged to accept the evidence of the assessor as to a value of $60,000.00, this being the best evidence available to the Board. It is significant that both the assesser and the appraiser arrived at virtually the same estimate of value for the land.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, c. 14;

- and -

IN THE MATTER OF: An Appeal by MOHAMMED ALI from the decision of the Regional Assessment Appeal Court, Lunenburg Region, made April 5, 1984, which confirmed the 1984 assessment of the Appellant's commercial property located at 586 Main Street in the Town of Mahone Bay.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: The Appellant, MOHAMMED ALI, appeared without Counsel;

MARIAN F. TYSON, LL.B, for the Director of Assessment.

DECISION

This is an appeal under the provisions of Section 100(1) of the Assessment Act, R.S.N.S. 1967, c. 14, by MOHAMMED ALI, from the decision of the Regional Assessment Appeal Court, Lunenburg Region, dated April 5,1984 which confirmed the 1984 assessment of the Appellant's property used partly for residential and partly for commercial purposes and situate at 586 Main Street in the Town of Mahone Bay in the amount of $72,700.00.

The Appellant's Notice of Appeal is dated April 18, 1984, and was received by the Board on April 24, 1984. The hearing of the appeal took place in the Town Council Chambers in the Town of Mahone Bay on June 14, 1984.

Counsel for the Director indicated that as far as she knew the Appellant had complied with all the statutory requirements of the Assessment Act. The Board therefore assumed jurisdiction to hear the appeal on the merits.

The Appellant gave evidence on his own behalf. He is the owner of a two-storey building known as Civic No. 586 Main Street in the Town of Mahone Bay. The building is located on a parcel of land having frontage of 86 feet on the street and being 150 feet in depth. The main floor is used as a retail clothing and dry goods store and the upper floor is used for residential purposes. The Appellant has been the owner of this property for nine years. The property is zoned commercial and was assessed for the year 1984 in the amount of $72,700.00.

The Appellant relies mainly on an appraisal report dated March 2, 1983, prepared by Joudrey Appraisals & Consultants Limited and signed by Robert A. Joudrey, which estimated the "fair market value" of the Appellant's property as of the date of the appraisal report in the amount of $50,000.00. A photocopy of the appraisal report was filed as Exhibit M-2. The author of the appraisal report was not called as a witness although the Appellant was given an opportunity by the Board to contact him to see if he would appear at the hearing and give evidence concerning his report.

The Appellant testified that the appraisal report had been prepared for the Bank of Montreal to which the Appellant had applied for a loan and that the original appraisal report was in the possession of the bank.

The Appellant gave evidence that a commercial/residential property located at the Village of Blockhouse owned by his father was assessed at $43,300.00 but was worth more than the Appellant's property. The Appellant stated that a property next to his in the Town of Mahone Bay owned by a Mr. Bezanson had a 20% increase in assessment whereas his had increased by 68%. He stated that the Bezanson land was slightly larger than his and contained a smaller building. The Bezanson property was assessed for $47,400.00.

Another property which the Appellant compared with his property is owned by Frank Mader and is located on Main Street in Mahone Bay. The building on the Mader land is used for retail store purposes and the business is known as Mahone Hardware. This property is assessed for $96,700.00 for 1984 and is used for commercial purposes only. The Appellant indicated that the Mader property was assessed for $82,000.00 in 1983 and therefore the increase in its assessment was 17%. Mr. Ali stated that his 1983 assessment amounted to $45,400.00 and was increased in 1984 to $72,700.00. This is in fact an increase of 62%.

The Appellant testified that in 1980 he had built an addition to his building by adding two bedrooms and enlarging the livingroom to the upstairs portion of the building at a cost of $13,000.00 for materials and labour plus two weeks of his own labour.

The Appellant stated that based on the Joudrey appraisal report his property was worth $50,000.00.

Evidence on behalf of the Director was given by Robert J. Smith, N.S.I.A. an assessor employed by the Department of Municipal Affairs. Mr. Smith has been a resident of Lunenburg County for 34 years and has been employed as an assessor for nearly 13 years. He has been responsible for preparing assessments for an area including the Town of Mahone Bay and the Municipality of the County of Lunenburg for the past 12 years.

Mr. Smith is the person who assessed the Appellant's property for the 1984 assessment year in the amount of $72,700.00 but as the result of his appraisal prepared for this hearing his final estimate of value is the amount of $60,000.00. When asked by Counsel for the Director to explain why he changed his opinion of value from $72,700.00 to $60,000.00 Mr. Smith stated that in preparing his appraisal report he decided "to have a second look at the property to thoroughly inspect it." This inspection indicated that there was only a crawl space under the ground floor and not a partial basement which he had assumed was the case, so he made an "adjustment for no basement". Also he stated that on "looking at the older section of the building I found some minor repairs needed so therefore I increased depreciation of 20% to 30% which I felt was fair depreciation on the age of that building".

Mr. Smith indicated that by eliminating the value of a 50% partial basement, the value of the property would be reduced by $8,000.00 to $9,000.00.

Mr. Smith had inspected the Appellant's property prior to fixing the 1984 assessment of $72,700.00 but had not observed the fact that the basement area was actually a crawl space 2½ feet to 3½ feet high and not a partial basement. He stated that he considers a 4-foot high basement area as a partial basement.

The difference between the assessor's assessed value of $72,700.00 and his latest appraisal value of $60,000.00 was the direct result of using a 30% depreciation figure rather than 20% for the older section of the building and deducting the value of a partial basement. The older section of the building was built about 1923. Mr. Smith stated he had allowed 5% depreciation for the newer section of the building.

The assessor used both a cost and a direct sales comparison approach in arriving at his opinion of value. He testified that he used Boeckh's Building Valuation Manual to calculate his cost value. He had not calculated a value based on a direct sales comparison for purposes of the hearing before the Regional Court. He stated that the only recent comparable sale he could find in the Town of Mahone Bay of a mixed commercial and residential property took place in 1980. This sale related to property situate at 534 Main Street which sold in 1980 for $65,000.00. The building on this property is 80 years old and is a 2-storey wood frame structure. According to Mr. Smith this comparable building is different from the subject building in that it is 35 square feet smaller, has extra plumbing, is on a smaller lot and has a basement. It has an apartment in the upper section. The building size of this comparable is 1485 square feet whereas the subject building contains 1520 square feet. Both the comparable and the subject property contain hot air heating systems and both buildings are in average condition. The assessor adjusted the comparable sale price of $65,000.00 for time by adding the sum of $9,800.00. He then deducted the sum of $5,000.00 because of the smaller size of the lot and deducted $10,000.00 for the value of a basement. The adjusted sale price was $59,800.00 based on a net adjustment of $5,200.00. The assessor stated that the value of $59,800.00 representing the adjusted sale price of the comparable property reinforced his estimate of $59,750.00 for the subject property obtained by the cost approach to value. The assessor's adjustment for time was based on his estimate that property values in the Town increased on average at a 5% rate per year based on sales information.

The assessor calculated the value of the subject land by taking a front foot value of $75.00 based on a standard sized lot of 70 feet by 100 feet and then making adjustments to compensate for the subject lot's variation from the standard lot size. The subject lot is 86 feet wide and 150 feet deep. The assessor calculated the land value of the subject property in the amount of $7,417.00 by multiplying $75.00 by 86 feet and then applying a depth factor for 150 feet of 1.15. He then rounded this result to $7,400.00. On being questioned by the Board, Mr. Smith stated that he had not personally determined the $75.00 per front foot rate but had obtained that rate from the Regional Director of Assessment, which is the rate pertaining to mixed commercial/residential properties and is the rate which he applied in assessing properties in the Town of Mahone Bay.

On further questioning by the Board Mr. Smith stated that he had not personally computed the 1.15 factor used to adjust the land value of the subject lot because it was 50 feet greater in depth than the standard sized lot on 100 feet. He had obtained this factor from the Regional Director after providing him with the lot size.

In his determination of the land value of the subject property Mr. Smith reviewed two sales of residential land in the Town, one on Pine Grove Street and the other on Spruce Street. He was unable to find any recent sales of commercial lands. His adjusted sale prices for these two lots were $6,700.00 and $6,900.00. From these two sales he concluded that $6,800.00 was the average selling price for a residential lot in the Town. He then concluded that a commercial lot or a commercial/residential lot in the Town would sell for a higher price than the average residential lot. Finally, he concluded that $7,400.00 was the proper value to place on the subject lot.

Mr. Smith pointed out that the Joudrey appraisal report indicated a land value of $7,482.00 based on 58¢ a square foot. The subject lot contains 12,900 sq. feet (86' x 150'). He testified that he had not discussed the value of the subject land with Mr. Joudrey.

The Board questioned Mr. Smith about his knowledge of the Bezanson property referred to in the evidence of the Appellant. Mr. Smith stated that he was familiar with the Bezanson property but was not aware of its selling price as he was not at the time of the hearing involved in the assessments of properties in the Town of Mahone Bay. He was of the opinion that the Bezanson property was less valuable than the subject property. He considered that the Bezanson property to be compared to the subject property would require a number of adjustments.

Mr. Smith on questioning by the Board stated that he spent about 10 minutes inspecting the Appellant's property on his first inspection visit. On his second visit he spent 10 - 15 minutes but made a more careful inspection of the building. He agreed that he had over-assessed the Appellant's property as a result of his first inspection but he felt that his second appraisal of $60,000.00 was correct. Mr. Smith indicated that

1984 was a reassessment year and that the increase in assessed values varied from 10% to 70%.

Based on the evidence it is the Board's opinion that the Appellant's property was assessed for the year 1984 in excess of its market value. Section 38 of the Assessment Act R.S.N.S. 1967 c. 14 reads as follows:

> "All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

The assessor Robert J. Smith admitted that his original assessment in the amount of $72,700.00 was incorrect because he has assumed the Appellant's property contained a partial basement when in fact it contained only a crawl space. Furthermore, Mr. Smith's first inadequate inspection of the subject property resulted in his application of a 20% depreciation rate respecting the older portion of the Appellant's building which following his second and more detailed inspection appeared to be understated and was increased to 30%.

As a result of his second and more thorough inspection of the subject property Mr. Smith arrived at a figure of $60,000.00 as his revised value for assessment purposes. This revised amount is $10,000.00 greater than the $50,000.00 amount estimated by Mr. Joudrey in his appraisal report prepared in connection with an application by the Appellant to the Bank of Montreal for a loan. The appraiser Mr. Joudrey did not appear as a witness to substantiate his estimate of value and the Board is therefore obliged to accept the evidence of Mr. Smith as to a value of $60,000.00. Mr. Smith's evidence is the best evidence available to the Board and the Board accepts his evidence. He is an assessor with nearly 13 years experience in assessing properties in the Lunenburg region and it is difficult for the Board to understand why he failed on his first inspection to observe that the subject property did not have a partial basement and required more than average repairs resulting in his change of depreciation from 20% to 30%. Nevertheless, he did produce for purposes of the hearing before the Board a credible appraisal report based in part on the additional information he obtained from his second visit to the subject property. It is significant that his estimate of land value in the amount of $7,400.00 is virtually the same as the estimate prepared by Mr. Joudrey.

The Appellant, relying on the Joudrey appraisal, obviously considered that his property was over-valued for the 1984 assessment year. His appeal to this Board has resulted in the assessor revising his opinion of value from $72,700.00 to $60,000.00 which latter amount the Board determines as the proper assessment of the Appellant's property for 1984.

Both parties stated prior to the conclusion of the hearing that they would not be seeking costs. The Board therefore makes no award as to costs.

The appeal is allowed and an order will issue accordingly.

DATED at HALIFAX, N.S., this 8th day of November, 1984.

RH Blois

R.H. BLOIS, Q.C.
CHAIRMAN, NOVA SCOTIA MUNICIPAL
BOARD.

T. Eaton Co. Ltd. v. Director of Assessment

ASSESSMENT--BUSINESS OCCUPANCY--DEPARTMENT STORE IN SHOPPING CENTRE--VALUATION--WHETHER MALL COMMON AREAS AND PARKING AREAS TO BE INCLUDED--INCOME METHOD--CAPITALIZATION RATE--ASSESSMENT ACT, Ss. 1(ja), 7(1),(2), (3), 38, 89(1)

This is an appeal from a decision of the Dartmouth Regional Assessment Appeal Court which inter alia increased the 1982 business occupancy assessment of the Appellant's department store in the Mic Mac Mall, City of Dartmouth from $1,504,100.00 to $1,815,800.00. As a result of an appeal by Mic Mac Shopping Centre Ltd., the owners of the Mic Mac Mall, the 1982 commercial assessment of the Mall was reduced from $36,775,000.00 to $35,985,000.00. The Judge of the Assessment Appeal Court as a result increased the Appellant's business occupancy pursuant to powers conferred by s. 89(1) of the Assessment Act.

HELD--The Board allows the appeal and reduces the business occupancy assessment from $1,815,800.00 to $1,543,200.00. The Appellant is entitled to its costs taxed on a party and party basis on the County Court scale.

The issue in this appeal is the determination of the Appellant's 1982 business occupancy assessment. The first question is whether the Appellant occupies or uses the Mall common areas and parking areas for business occupancy assessment purposes. This is a question of fact. Where more than one person exercises acts of occupation with respect to a property, it is necessary to examine the degree of control being exercised over the property by the persons occupying or using the property. Under the Appellant's lease with the landlord the Appellant is not demised a specific portion of the common areas or parking areas but is granted a right, etc., to use all of the parking areas and common areas in common with other tenants and the landlord. The Appellant does not have control over these areas to the substantial exclusion of all other persons. Because of this lack of control, the Appellant is neither occupying nor using the Mall common areas or parking areas within the meaning of s. 7(1) of the Assessment Act. It is the owner of the Mall that is the occupier of the parking areas. Section 7(3) does not only apply to commercial property operated as a pay parking lot. The presumption created by s. 7(3) has not been rebutted because there was no evidence to prove that either the Appellant or other tenants had sufficient occupation and control over the parking areas to bring them within s. 7(1). The Appellant's business occupancy assessment should not be computed by reference to an assessed value which includes a value attributable to those areas. There is no statutory provision enabling the assessor to assess anyone the value of Mall common areas for business occupancy purposes. The Board accepts the opinion of the Appellant's appraisor that the assessed value of the Appellant's property should be $3,086,313.00. While he used the cost method, he would have reached the same result using the income method. The only difference between the assessor and the Appellant's appraisor is the rate of capitalization. The Board agrees with the Appellant that 14% rather than 11% is a more appropriate capitalization rate. The business occupancy assessment is 50% of the assessed value of the Appellant's property, i.e., $1,543,156.00, rounded to $1,543,200.00.

NOTE: Application by the Director for leave to appeal was granted by the Appeal Division of the Supreme Court of Nova Scotia. This appeal will be heard on March 19, 1985. (See Supreme Court File S.C.A. 01386).

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act Chapter 14, R.S.N.S. 1967 as amended;

- and -

IN THE MATTER OF: An Appeal by T. Eaton Co. Ltd. from the decision of the Dartmouth Regional Assessment Appeal Court respecting the business occupancy assessment of its property located in the Mic Mac Mall, City of Dartmouth, Province of Nova Scotia.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, Vice-Chairman
DARRYL W. WILSON, C.A., LL.B., Member

COUNSEL: PETER A. MILLIGAN, LL.B., and MICHAEL T. PUGSLEY, LL.B., for the Appellant,

BRIAN S. NORTON, LL.B., for the Director of Assessment

DECISION

The Appellant, T. Eaton Company Ltd., appealed the decision of the Dartmouth Regional Assessment Appeal Court dated December 6, 1982, which decision inter alia increased the 1982 business occupancy assessment of the Appellant's property located in the Mic Mac Mall, City of Dartmouth, used for purposes of a department store from $1,504,100.00 to $1,815,800.00.

As a result of an appeal by Mic Mac Shopping Centre Ltd., owners of the Mic Mac Mall, the 1982 commercial assessment of the Mall was reduced from $36,775,000.00 to $35,985,000.00. The Appellant does not take issue with the valuation placed on the Mall for purposes of the 1982 commercial assessment. Further to the reduction in the commercial assessment of the Mic Mac Mall, the Judge of the Regional Assessment Appeal Court, pursuant to the powers conferred upon him by Section 89(1) of the Assessment Act, increased the Appellant's business occupancy assessment from $1,504,100.00 to $1,815,800.00. Section 89(1) of the Assessment Act reads in part as follows:

> "89(1) On any appeal, the court may
>
> (a) confirm, reduce or increase the valuation of the property that is the subject of the appeal, and confirm, reduce or increase an occupancy assessment notwithstanding that the occupancy assessment was not appealed;"

It is this decision of the Dartmouth Regional Assessment Appeal Court increasing the Appellant's business occupancy assessment despite the reduction in the commercial assessment of the Mall that is being appealed.

The hearing of the appeal took place on June 28th and 29th, 1983 in the hearing room of the offices of the Expropriations Compensation Board, 1660 Hollis Street, Suite 904, Halifax, N.S. Subsequent to the conclusion of the hearing, Counsel filed briefs with the Board with the last brief received by the Board on September 2, 1983.

The issue in this appeal is the determination of the business occupancy assessment of the Appellant's property in the Mic Mac Mall for the 1982 assessment year.

Section 7(1) of the Assessment Act, Chapter 14, R.S.N.S. 1967 as amended, provides for the levying of a business occupancy assessment and it reads in part as follows:

> "7(1) In addition to any assessment of property under this Act, every person occupying or using any commercial property except .... shall be assessed for a sum to be called "business occupancy assessment."

Section 7(2) provides for the computation of business occupancy assessment and it reads in part as follows:

> "7(2) Business occupancy assessment shall be computed by reference to the assessed value of the property occupied or used as follows:
>
> (c) in a sum equal to fifty per centum of the assessed value for persons occupying or using property for a purpose not mentioned in or excluded from clauses (a) and (b)."

The Appellant's business purpose is not mentioned in or excluded from Clause (a) or (b) and therefore falls under Clause (c).

Section 7(3) of the Assessment Act relates to the occupier of commercial property used for parking motor vehicles and it reads as follows:

> "7(3) Every assessed owner of commercial property used for parking motor vehicles shall be deemed to be the occupier of the property."

Section 38 reads as follows:

> " All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

Evidence during the hearing was given by Lincoln W. North AACI, MAI, SREA, CRE, EA, P.Eng., on behalf of the Appellant and Thomas B. Mills, NSIA, on behalf of the Director of Assessment.

Mr. Mills has been employed as an Assessor since 1974 and he has held the office of Assistant Director of Assessment for the Dartmouth Assessment Region since 1979. His responsibilities include the valuation for assessment purposes of multi-tenant commercial buildings in the City of Dartmouth. He determined the 1982 commercial assessment of the Mic Mac Mall and the 1982 business occupancy assessments of the Mall tenants.

Mr. Mills initially determined the real property commercial assessment of the Mic Mac Mall for 1982 to be $36,775,000.00. During 1981, the size of the Mic Mac Mall was increased and Mr. Mills calculated the 1982 real property commercial assessment of the expanded Mall by adding the assessed value of the Mall prior to expansion to the assessed value he determined for the expanded area. This assessment was appealed by the Mall owner. Mr. Mills reviewed his original method of determining the Mall assessment and concluded that his method of valuing the expanded Mall was incorrect. The result of his reassessment of the entire Mall was a recommendation to the Dartmouth Regional Assessment Appeal Court to reduce the real property commercial assessment of the Mic Mac Mall to $35,985,000.00. This value was accepted by the owner of the Mall and confirmed by the Dartmouth Regional Assessment Appeal Court.

Mr. Mills also recommended to the Dartmouth Regional Assessment Appeal Court that the business occupancy assessments of the tenants in the Mall be adjusted as a result of the reduction of the assessed value of the Mall. In the process of reassessing the Mall for 1982, Mr. Mills concluded that the economic rents he had originally estimated for the property occupied by the anchor stores, such as Eaton's and Simpson's, were low and he increased them. According to Mr. Mills, the business occupancy assessment of the Appellant was increased to $1,815,800.00 from $1,504,100.00 despite the reduction in the assessed value of the Mall because the revised economic rental income assigned by him to the property occupied by the Appellant represented a greater proportion of the total economic rental income of the Mall than the initial economic rental income assigned by him to the Appellant's space.

Mr. Mills said that he used the income method to determine the assessed value of the Mic Mac Mall for 1982. According to Mr. Mills, this method involves estimating the net income from the property and dividing the net income by an appropriate capitalization rate taken from the market place. The net income is determined by calculating the net absolute rents to the owner and subtracting the expenses necessary to operate the property. Added to the value determined from capitalizing income is a value for leasehold improvements. The assessed value for Mic Mac Mall for 1982 using this method was determined to be $35,985,000.00 consisting of $33,106,000.00 from capitalized net income and $2,879,000.00 as the value for leasehold improvements.

Mr. Mills determined the assessed value of the property occupied by the Appellant and the other Mall tenants for purposes of determining their business occupancy assessment by apportioning the assessed value of the entire Mall property excluding leasehold improvements among tenants on the basis of the income contribution each tenant's property makes to the total rental income of the Mall, and then adding to that figure the value of their leasehold improvements. Mr. Mills described the mechanics of this method as it applies to the Appellant as follows:

$$\frac{\text{Property Value Before Leasehold Improvements}}{\text{Total Rental Income of Mall Excluding Income Based on Percentage of Sales}} = \text{Factor} \times \text{Rental Income of Appellant's Premises} = \text{Assessed value of Appellant's Property before Adjustment}$$

$$\frac{33{,}106{,}000}{4{,}965{,}297} = 6.667 \times 481{,}225 = 3{,}208{,}327$$

Mr. Mills adjusted the assessed value of the Appellant's property determined from capitalized net income from $3,208,327.00 to $3,184,797.00 to alleviate the distortion in assessed value to the Appellant's property caused by rents based on a percentage of sales being included in the total rental income of the Mall. The adjusted assessed value of $3,184,797.00 is calculated by multiplying $33,106,000.00 (the assessed value of the entire Mall excluding leaseholds) by 9.62%. The Appellant's economic rent of $481,225.00 is 9.62% of $5,003,614.00 which is the total economic rental income from all the tenants of the Mall including rent based on percentage of sales. The assessed value of the Appellant's property excluding leaseholds determined by the formula above is $3,208,327.00 which is 9.69% of the assessed value of the Mall excluding leaseholds. Mr. Mills said that the assessed value of $3,208,327.00

should be reduced to $3,184,797.00 so that the percentage that the assessed value of the Appellant's property, excluding leaseholds, is of the assessed value of the entire Mall excluding leaseholds is equal to the percentage that the rental income from the Appellant's property is of the total rental income of the Mall.

Mr. Mills determined the assessed value of the Appellant's leasehold improvement to be $370,000.00 by estimating the cost of the leasehold improvements at December 1, 1981 and depreciating them by 33%.

The total assessed value of the Appellant's property determined by Mr. Mills for business occupancy assessment purposes was $3,554,979.00 consisting of $370,000.00 for leasehold improvements and $3,184,797.00 from capitalized net income. By multiplying the assessed value of $3,554,797.00 by 50% which is the applicable percentage relating to the Appellant's business function under Section 7(2)(c) of the Assessment Act, Mr. Mills determined the Appellant's business occupancy assessment to be $1,777,398.50 rounded to $1,777,400.00.

In determining the assessed value of the Mic Mac Mall and the assessed value of the Appellant's property for business occupancy assessment purposes, Mr. Mills, in using the income approach, calculated the rental income of the Appellant's property. Mr. Mills calculated this rental income to be $481,225.00 by multiplying the area occupied (79,149 sq.ft.) by an estimated economic rent per square foot of $6.08.

The economic rent of $6.08 per square foot was derived by applying a market borrowing interest rate to the depreciated capital cost required to construct the Appellant's portion of the Mall and dividing the result by the area occupied. Mr. Mills estimated the depreciated capital cost required to pay for the land and construct the Appellant's premises in the Mic Mac Mall as of December 1, 1981 to be $3,184,250.00 consisting of $399,000.00 for land and $2,785,250.00 for the depreciated capital cost of the building. Mr. Mills determined the market borrowing interest rate to apply to the capital costs to be 14.33%. The market borrowing interest rate of 14.33% was obtained by analyzing the capital costs, rent payment and lease term of the Simpson's store second floor expansion in the Mic Mac Mall in 1981. Mr. Mills amortized the capital costs of $3,184,250.00 over 22 years at the market borrowing interest rate of 14.33 percent which produced a sum of $481,225.00 which he determined to be the economic rent for the Appellant's property. He divided the annual economic rent of $481,225.00 by the area occupied (79,149 sq.ft.) to establish the economic rent of $6.08 per square foot.

The Appellant agreed with the economic rental of $6.08 per square foot, the total rental income of $481,225.00 and the leasehold improvement value of $370.000.00 used by Mr. Mills in his determination of the assessed value of the Appellant's property for business occupancy assessment purposes.

Mr. Mills' method of calculating the assessed value of the Appellant's property for business occupancy assessment purposes was to apportion the total assessed value of the Mall among the tenants based on the percentage that each tenant's economic rent is of the total economic rent of the property. According to Mr. Mills, this method provides a uniform apportionment of the assessed value of the Mall among the Mall tenants. A result of using this method was to apportion the value of the building common areas, parking lot and synergistic benefit which Mr. Mills said is included in the assessed value of the Mall on a proportionate basis to the assessed value of each tenant's property for business occupancy assessment purposes. Mr. Mills stated that the valuation of these three components was done through the capitalization of the Mall income at the time of valuing the Mall for its commercial assessment and not by any independent method.

Mr. Mills estimated the value of the common area, parking area and synergistic benefit included in the assessed value of the Appellant's property to be $468,630.00 but he was not able to break down the figure of $468,630.00 among its components. The figure of $468,630.00 is calculated by subtracting the capital cost required to construct the Appellant's property at December 1, 1981 ($3,184,250.00) reduced by the general level of assessment of 85.3% to $2,716,167.00 from $3,184,797.00 which is the assessed value of the Appellant's property excluding leaseholds.

Mr. Mills estimated a value of $330,600.00 for the Parking Area as a portion of the assessed value of the Appellant's property for business occupancy assessment purposes calculated as follows:

Number of spaces necessary within Eaton's lease:	5.5 per 1000 sq.ft. of G.L.A.
Area of 1 space:	8' x 20' = 160 sq.ft.
Leaseable area:	79,149 sq.ft.
Land Value:	$4.75 per sq.ft.

79,149 ÷ 1000 = 79.149

79,149 x 5.5 = 435 Parking Spaces

435 x 160 sq.ft. = 69,600 sq.ft.

69,600 x $4.75 = $330,600

It should be noted that the value of $330,600.00 was not derived from the assessed value of the Mall determined by capitalizing the net income of the property but was arrived at by an independent method attempting to estimate a value for the number of parking spaces the Appellant was entitled pursuant to its lease. In the opinion of the Board, the determination of $330,600.00 is not directly related to the value of $468,630.00, being the amount estimated by Mr. Mills to represent the total assessed value of the Appellant's share of the common areas, parking areas and synergistic benefits which was calculated by subtracting the capital costs required to acquire the land and construct the premises used for the Appellant's merchandising activity from the assessed value of the Appellant's property.

Mr. Mills said that the agglomeration of various retail components into one operating unit (the Mall) creates a benefit to the entire Mall which would not exist if the retail outlets were disbursed throughout the city. He referred to this benefit as a synergistic benefit and said the result of this benefit is that the value of the entire Mall exceeds the value of the individual components of the Mall. Mr. Mills was not able to measure the value of this benefit in terms of dollars. However, he said that the value of synergistic benefit existing in the Mall should be apportioned for business assessment purposes among the tenants in proportion to the quantity of income generated by each tenant in relation to the total income of the Mall. In support of this argument, Mr. Mills relies upon the principle of contribution which is defined by the Appraisal Institute of Canada in its text entitled, "Introduction to Real Estate Appraising" as follows:

> " This principle affirms that the value of any component of a property is measured by how much it adds to the net income by reason of its presence, or detracts from the net income by reason of its absence. In other words, the value of any factor in production depends upon its contribution to net income and not upon its costs."

Mr. Mills said that part of the assessed value of the Mall assigned to the Appellant includes a value representing the Appellant's share of parking areas. Section 7(3) of the Assessment Act is relevant in this regard. Mr. Mills said that in considering the application of Section 7(3) of the Act, he looks to the primary use of the commercial property. According to Mr. Mills, the land used as parking areas for the Mic Mac Mall is used ancillary to the retail businesses of the Mall and is not used for a separate commercial activity. In Mr. Mills' opinion, Section 7(3) of the Act is not applicable in the shopping centres but rather to commercial parking lots being available for rental.

Mr. Mills said that the lease agreement between the Appellant and the Mic Mac Mall Shopping Centre Limited, the owner of the Mic Mac Mall including the parking areas indicates that the owner is responsible for operating and maintaining the parking areas and Common Mall Areas. Under the terms of the lease, the owner can recover such costs from all tenants including the Appellant. However, there is a limit in the amount of costs recoverable by the owner from the Appellant.

The section of the lease dealing with operations and maintenance of Common Mall Areas and Parking areas included the following:

> "Article 1 - Section 1.00(2)
>
> "Common Area Improvements" means all improvements which are intended and available for common use and enjoyment of all tenants of the Shopping Centre including the Tenant and their respective agents, invitees, servants, employees, licensees and customers, as the case may be, as from time to time altered, reconstructed or expanded, and includes the Mall (except for kiosks and an area outside kiosks as provided in Section 17.00) and Parking Areas.
>
> Article 1 - Section 1.00(12)
>
> "Leased Premises" means the Eaton's Department Store Lands, the Eaton's Department Store Building and, where the context permits:
>
> (a) the right and license of the Tenant to have seasonal use of the Eaton's Outdoor Selling Area as provided in Section 17.01; and
>
> (b) the appurtenant rights, easements and licenses of the Tenant in respect of Common Area Improvements granted by Section 2.01.

"Article 2 - Section 2.00

The landlord hereby leases to the Tenant for the Term, upon and subject to the covenants and conditions hereinafter expressed, the Eaton's Department Store Lands and the Eaton's Department Store Building."

"Article 2 - Section 2.01

The Landlord grants to the Tenant for the Term as an appurtenant part of the Leased Premises, for use by it and its agents, invitees, servants, employees, licensees and customers, in common with the Landlord and other tenants of the Shopping Centre and their respective agents, invitees, servants, employees, licensees and customers, the right, easement, right-of-way and license to use the Common Area Improvements for the purposes as provided herein and in accordance with good shopping centre management, (subject to the Landlord's right, upon reasonable notice to the Tenant and except in the case of emergency at a time when the Shopping Centre and/or the Eaton's Department Store Building is closed for business, to close of the Common Area Improvements only for such time as may be required for the purpose of preventing the acquisition of public or private rights-of-way or easements) upon and subject to the covenants and conditions hereinafter expressed and in particular, without limiting the generality of the foregoing, such right, easement, right-of-way and license of use hereby granted to the Tenant shall include:-

(1) the right to use the Parking Areas (including the means of pedestrian and vehicle access and the entrance and exits to and from the Shopping Centre included therein, but excluding those portions thereof which constitute the Eaton's Outdoor Selling Area, and the Simpson's Outdoor Selling Area, while seasonally used and occupied by the Tenant and Simpsons respectively as permitted hereunder) for the purposes of pedestrian and vehicular access to and from the Shopping Centre and the parking of vehicles in parking spaces provided therein;

(2) the right of pedestrian passage and repassage through each level and every portion of the Mall (but excluding those portions thereof which are occupied by kiosks permitted hereunder,

> while so occupied) for the purpose of gaining access to or from every portion of the Shopping Centre including the Eaton's Department Store Building; and
>
> (3) the right to use the public washrooms, corridors, entrances and exits to buildings and all other facilities provided for common use and enjoyment as part of the Common Area Improvements.
>
> It is understood and agreed that while and to the extent that the Eaton's Outdoor Selling Area or the Simpson's Outdoor Selling Area or both are being used for selling purposes as contemplated under this Lease, the right, easement, right-of-way and license to use the Common Area Improvements shall be appropriate modified."

Mr. Lincoln W. North is the President of Lincoln North & Company Ltd. He has been engaged professionally as a Real Estate Appraiser, analyst and Counsellor since 1959 and is qualified to give expert opinion on the valuation of real property.

Mr. North said he was retained by the Appellant to provide it with an opinion on the appropriate method which should be employed in establishing the assessed value of the Appellant's property for the purposes of determining its business occupancy assessment.

Mr. North said he reviewed the assessor's valuation of the Mic Mac Mall. He agreed with the method used by the assessor to value the Mall as a whole and with the final assessed value of the Mall.

Mr. North also reviewed the assessor's determination of the assessed value of the Appellant's property for purposes of determining its business occupancy assessment. According to Mr. North, the assessor, in determining the assessed value of the

Appellant's property first, estimated on economic rent for the property; second, weighted the rent for the Appellant's property against the total rent of the Mall in order to get a factor, third, applied the factor to the assessed value of the Mall excluding leaseholds to obtain the assessed value of the Appellant's property excluding leaseholds and fourth, added the value of the Appellant's leasehold improvements to the assessed value of the property excluding leasehold improvements.

Mr. North reviewed the assessor's estimate of economic rent for the Appellant's property. According to Mr. North the rental value of all free standing single tenant properties is primarily a function of the capital costs required to create the facility. Mr. North considers department stores such as the Appellant's premises in the Mic Mac Mall, whether attached to or detached from a shopping mall, to be the equivalent of free-standing single tenant properties. According to Mr. North, a department store is not only a physical anchor in a shopping centre but generally participates in an advisory capacity with the developer from the initial conceptual planning stage of the shopping centre. As a result, Mr. North said the rental value of the Appellant's property is directly influenced by all the costs of creating its portion of the Shopping Centre. The method of fixing the annual economic rent for the Appellant's property is thus a function of multiplying the aggregate capital costs of the store by an appropriate rent factor. According to Mr. North, the rental factor which converts the capital cost into an annual rent comes from the money market. Mr. North said this method of determining rent contrasts with rents charged to the "strip" tenants in the Mall which are more a function of prevailing market rental rates and of the most probable retail sales performance of the merchants although influenced by the developers' costs of creating the Mall tenants' space.

Mr. North said that the assessor determined the economic rent for the Appellant's property by multiplying the capital costs required to construct the facility by a rental factor. Mr. North agreed with the capital costs of $3,184,250.00 and the market interest rate of 14.33% used by Mr. Mills in the determination of the Appellant's rent and he also agreed with the estimated economic annual rent of $481,225.00 and the rent per square foot of $6.08 determined by the assessor.

Mr. North disagreed with the assessed value of the Appellant's property determined by Mr. Mills. Mr. North reviewed the methods he considers are available to the assessor to determine the assessed value of the Appellant's property. In the opinion of Mr. North, the sole determinant of the current market value of a department store such as the Appellant's property in the Mic Mac Mall to a purchaser/user would be the sum of the replacement cost of the store less depreciation and the current market value of the underlying land. This is so because the purchaser/user's only alternative would be to acquire a similar parcel of land and construct a similar building. Mr. North said that if the property already is occupied by a tenant under a typical department store lease, an alternative purchaser would be an investor. According to Mr. North, in this situation the market value of a department store would be determined by discounting the rental income of the department store by the yield prevailing on long-term corporate bonds plus a bonus for the relative non-liquidity and other factors which might have to be considered. According to Mr. North, this discount factor would be the same rate applied to the capital cost of the property to determine the current market rent.

In Mr. North's opinion, both the cost approach and the income approach essentially would produce the same expression of current market value for a department store. Mr. North said that the income method can be used provided the correct discount rate or capitalization rate is used. In Mr. North's opinion, the cost approach is preferable because the application of the income approach leads to the same value which is more easily and quickly estimated by the cost approach. Also Mr. North said the cost approach tends to give a more consistent trend in the valuation process from one year to the next, whereas the volatile nature of the money market may result in wider fluctuations with the passage of time.

According to Mr. North, Mr. Mills used the income method in determining the assessed value of the Appellant's property and indoing so, capitalized the rent previously determined ($481,225.00), at a rate of 11% which is different from the rate of 14.33% used to determine the Appellant's economic rent. The rate of 11% is the capitalization rate used by the assessor in his valuation of the Mall as a whole. According to Mr. North, the overall rate of 11% for a blend of components, that is, anchor tenants and strip tenants, would be correct for the Mall as a whole but the capitalization rate applicable to each component would be different from the overall rate of 11%. According to Mr. North, the use of a discount rate different from the discount rate used to determine the Appellant's rent results in the assessed value of the Appellant's property being greater than the capital costs required to construct its premises.

In Mr. North's opinion, the assessor should determine the assessed value of the Appellant's property for business occupancy assessment purposes directly, by either the cost method or the income method rather than dividing the assessed value of the total Mall which includes a value for the Common Mall Areas and the Parking Areas among the Mall tenants in proportion to the rent they contribute to the overall income of the Mall. In Mr. North's opinion, the Common Mall Areas and Parking Areas are not occupied or used by the Appellant within the meaning of Section 7 of the Assessment Act because these areas are not exclusively occupied by the Appellant and the Appellant's lease with the landlord establishes responsibility for and control of these areas with the landlord.

In Mr. North's opinion, the 1983 value of the Appellant's property for business occupancy assessment purposes should be $1,543,156.00 calculated as follows:

LAND	399,000.00
BUILDING (REPLACEMENT COST LESS DEPRECIATION)	$2,785,412.00
INDICATED VALUE	$3,184,412.00
GENERAL LEVEL OF ASSESSMENT 85.3%	$2,716,313.00
LEASEHOLD IMPROVEMENTS	$ 370,000.00
TOTAL ASSESSED VALUE	$3,086,313.00
BUSINESS OCCUPANCY ASSESSMENT 50%	$1,543,156.00

Counsel for the Appellant submits that the assessor in estimating the assessed value of the property occupied or used by the Appellant for purposes of business occupancy assessment,

(1) erred by concluding that the Appellant occupied or used, in addition to the space used for its merchandising activites, the Mall parking area and the Mall common area.

(2) Erred by including a portion of the value of the Mall common area, parking area and synergistic benefit in the assessed value of the property occupied by the Appellant.

(3) Erred by not applying the provisions of Section 7(3) of the Assessment Act which states than an assessed owner of commercial property used for parking motor vehicles is deemed to be the occupier of the property.

(4) Erred by using an incorrect method to value the property occupied or used for the Appellant's merchandising activity.

Counsel for the Appellant submits that the Appellant does not occupy or use the Mall parking area or Mall common area pursuant to Section 7(1) of the Assessment Act. Counsel for the Appellant submits that the words "occupying or using" which appear in Section 7(1) of the Assessment Act, quoted at Page 3 of this decision, refers to actual possession or control of the property to the exclusion of others and does not refer to a right to enjoy the benefits of the property in common with others. Counsel for the Appellant submits that the Appellant only has a contractural right to use the property in common with other tenants.

In support of its position that business occupancy assessment is based on the actual occupation or use of commercial property, Counsel for the Appellant referred to in Black's Law Dictionary, revised 4th Edition which defines the word "occupy" and "use" as follows:

occupy	- "to take or enter upon possession of; to hold possession of; to hold or keep for use; to possess, to tenant, to do business in, actual use, possession and cultivation." (Page 1231).
use	- "the use of a thing means that one is to enjoy, hold, occupy, or have some manner of benefit thereof. To make use of, to convert to one's services, to avail oneself of, to employ."

Further at Pages 3 and 4 of his post-hearing brief, Counsel for the Appellant states:

> " Further, a clear reading of Section 7(1) and 7(2) of the Act demonstrates that Business Occupancy Assessment is an assessment that is made on the actual occupation or use of premises based on the various commercial activities that may be carried on in them. The various percentages of assessment ascribed to commercial activities supports this submission. The words of Section 7(2)(c) "occupying or using property for a purpose not mentioned or excluded from clauses (a) and (b)" relates back to the

series of listed business occupations in subsections (b) and (a) and supports the submission that business occupancy assessment is directly related to actual occupation or use of a defined area.

It is submitted that this position is further supported by the fact that Business Occupancy Assessment does not create a tax in the nature of a real property tax in that no lien is created on the land. It is in fact a personal tax on the person or business being so assessed (Reference Section 7(6) of the Assessment Act.) The tax liability itself arises on occupancy or use. For example, in the case of an owner whose property might be exempt from taxation an occupant or any person other than that owner who occupies for a commercial purpose would be liable to Business Occupancy Assessment and taxation. (Reference, Section 8(1) of the Act.)

Therefore, it is submitted that the Business Occupancy Assessment must find as it fundamental premises physical occupation being actual occupation or use of the premises for the business purpose and that areas not in control or possession of the taxpayer are not assessable to him."

"Occupant" is defined in Section 1(ja) of the Assessment Act as follows:

> " "occupant" includes the resident occupier of the land, or, if there is no resident occupier, the person entitled to the possession thereof, a leaseholder and a person having or enjoying in any way for any purpose the use of land otherwise than as owner and includes a landlord where the average period of occupancy by individual tenants is less than three months:"

Counsel for the Appellant referred the Board to the cases of Riverport Seafoods Ltd. and the Municipality of Lunenburg v. Director of Assessment (1981), 44 N.S.R. (2d) 281 and the Public Service Commission of Halifax v. County of East Hants and Director of Assessment (1979), 33 N.S.R. (2d) 451.

It is the submission of Counsel for the Appellant that Mr. Justice Hart in the case of Riverport Seafoods Ltd. (supra) approved of the following three tests in determining an "occupant" pursuant to Section 1(ja) viz;-

(1) Whether or not the taxpayer has legal or defacto control of the premises in question.

(2) Whether or not the taxpayer merely uses them as a member of the taxpaying public (non-exclusivity).

(3) If the owner permits someone to actually occupy the land and is not using it for its own purposes, then such an occupant is properly assessed.

Counsel for the Appellant argues that the Appellant "has no actual or defacto control of the common elements in question and that any enjoyment that it has is limited and is in common with other tenants by virtue of the lease arrangements. For example the common mall area is nothing more than a street on which shoppers may move from one store to another". Counsel for the Appellant submits that this common area is no more assessable to a tenant of the Mall than a closed street turned into a pedestrian Mall such as is found on Granville Street in the City of Halifax adjacent to Historic Properties is assessable to abutting store occupants.

Counsel for the Appellant also submits that the lease between the owner of the Mall and the Appellant filed as Exhibit 7 clearly delineates responsibility as well as control of the common areas, including the parking lot, to the landlord. At Page 9 and 10 of his post-hearing brief, Counsel for the Appellant states:

> " It is submitted that by a reading of the lease itself, (Exhibit 7 to the proceedings), the control of the mall common area and the parking lot with respect to is occupation and use is in the landlord Mic Mac Shopping Ltd. Under the lease, Eaton's occupies and uses designated space and has a limited enjoyment of the common areas including the parking lot. Mic Mac Shopping Ltd.'s presence in respect of these common areas is dominating in all of the lease arrangements. In cross-examination, Mr. Mills admitted that this was the case and further admitted that the overall control of mall operations including such matters as repairs and snow removal in the parking lot and the policing and maintenance in the mall common areas rested with Mic Mac Shopping Centre Ltd. It is submitted on behalf of Eaton's that there can be no dispute that Exhibit 7 demonstrates that any interest of Eaton's is clearly subordinate to that of Mic Mac Shopping Centre Ltd. with respect to these common areas and that therefore, for purposes of Business Occupancy Assessment such areas are rightfully assessed to the owner of the mall who then, through its contractual arrangements with various tenants, can apportion the taxation liability which follows as a result."

Counsel for the Appellant also relies on the comments of Mr. Justice Coffin in the case of Public Service Commission of Halifax (supra) concerning exclusive occupancy where at Page 466 he states:

> "under the authorities, it is possible to have more than one person exercising some acts of occupation and the principle that occupation must be exclusive is subject to the modification set out in the cases which I have mentioned."

Counsel for the Appellant submits that in cases where there is more than one person exercising acts of occupancy, Justice Coffin's reference to the modification of the principle that occupation must be exclusive means that in determining the occupant for assessment purposes you consider the following principles:

(1) The effect of alleged control must depend upon facts and the degree of control must be examined.

(2) Exclusive occupation may exist in certain circumstances where others may have limited rights with respect to the premises.

(3) Limited rights of access which [illegible]uld be characterized as occupation or use will not give rise to business occupancy assessment where control which is very necessary resides in a party other than the taxpayer in question.

Counsel for the Appellant submits that the owner of the Mic Mac Mall maintains managerial premises and staff for maintenance and control of the Mall common area and parking areas and this is evidence that the owner is enjoying the use of these premises for its purposes and is therefore the "occupant" of the Mall common area and parking area pursuant to Section 1(ja) of the Assessment Act and further that the Appellant's rights in the Mall common areas and parking areas are limited and subordinate to the overall and necessary control of these areas by the owner. Further, Counsel for the Appellant submits that a reading of the lease between the owner of the Mall and the Appellant indicates that the control of the Mall common areas and parking areas with respect to its occupation and use is in the landlord. Therefore, Counsel for the Appellant submits that the Appellant does not have sufficient control of the common areas to be considered an occupant for purposes of business occupancy assessment.

In addition, with respect to the parking lot, Counsel for the Appellant submits that Section 7(3) of the Assessment Act, quoted at Page 3 of this decision, is unequivical and clear that the owner of commercial property used for parking motor vehicles is the occupant for business occupancy assessment purposes. Since the Appellant is not the owner of the property surrounding the Mic Mac Mall which is used for parking motor vehicles, Counsel for the Appellant submits that it is not the occupant of the parking area for purposes of business occupancy assessment.

Counsel for the Appellant further submits that Section 7 of the Assessment Act does not contemplate the assessment of Mall common areas for business occupancy assessment purposes. However, he submits that if the Mall common areas are susceptible of business occupancy assessment, they should be assessed to the owner who has dominant possession and control over the areas.

With respect to the inclusion of part of the synergistic value of the Mall in the assessed value of the Appellant's property for business occupancy assessment purposes, Counsel for the Appellant submits that synergistic benefits are not assessable property as defined by Section 1(a) of the Assessment Act and therefore not taxable property pursuant to Section 2 of the Act. Counsel further argues that occupation and use are matters of physical fact and the concept of synergistic benefit, while important to the valuation of the overall realty bear no relationship to the assessed value of the Appellant's property for purposes of determining its business occupancy assessment.

It is further submitted by Counsel for the Appellant that the method used by Mr. North values only the property occupied or used by the Appellant for its merchandising purposes and is preferable to the method used by Mr. Mills. Counsel for the Appellant submits that the assessor's method of using an interest rate of 14.33% to determine the rent for the Appellant's property from its capital costs and then capitalizing that rent with a rate of 11% to get a market value for the Appellant's property for business occupancy assessment purposes produces a value in excess of the capital costs required to construct the Appellant's property and thus an excess of the assessed value of the Appellant's property. Counsel for the Appellant submits that while this excess value may represent the value of common elements such as parking and common areas, it is not a value which is attributable to the Appellant for purposes for business occupancy assessment.

Counsel for the Respondent in his brief filed with the Board after the conclusion of the hearing, says there are three primary questions raised in this appeal:

(1) Did the Appellant occupy or use any commercial property?

(2) What property did it occupy or use?

(3) How should the Appellant's business occupancy assessment be computed?

It is admitted by the Appellant that it occupied and used commercial property in the Mic Mac Mall. The disagreement between the Appellant and the Respondent is with respect to what property the Appellant occupied or used and a proper method to compute the business occupancy assessment for the space occupied or used.

At Page 5 of his post-hearing brief, Counsel for the Director states:

" The Supreme Court of Nova Scotia Appeal Division has considered and defined the term (occupant) in Public Service Commission of Halifax v. County of East Hants and Director of Assessment (1979), 33 N.S.R. (2d); see also Riverport Sea Foods Limited and Municipality of Lunenburg v. Director of Assessment (1981), 44 N.S.R. (2d) 281 (N.S.S.C., App.Div.).

In addition to the above authorities and definitions the Respondent directs the board's attention to Exhibit E-7 being the Lease between Mic Mac Shopping Centre Limited and the T. Eaton Company Limited. Section 2.01 leases the premises including common areas and Section 1.00 (12) defines "Leased Premises" to include the Eaton's Department Store, common selling areas and common area improvements. Thus Eatons is a joint leasehold tenant of these common areas.

It is submitted on the basis of the foregoing definitions and the provisions of the Eaton's lease that the Appellant company occupied the Eaton's Store and in addition the parking lot and other common area improvements in common with other mall tenants and had the right to use these areas for itself, its agents, invitees, servants and employees, licensees and customers."

Counsel for the Respondent also submits that the landlord, in performing maintenance functions on Mall common areas, acts as an agent or property manager for the tenant rather than as an actual occupier of these areas. He referred the Board to the case of Greater Hamilton Shopping Centres Limited v. City of Hamilton (1960), 22(D.L.R.) (2d) 284 (Ont. H.C.) where the Court held that a landlord was not occupying or using land for business purposes by reason of the fact he maintained common elements in accordance with the provision of lease arrangements with its tenants.

Counsel for the Respondent also submits that the assessor's method in computing the Appellant's business occupancy assessment is supported by the Assessment Act and the case law. Counsel for the Director submits that the assessor's method in valuing multi-tenant commercial properties is to value the entire property at its market value in accordance with Section 38 of the Assessment Act. When the assessor is computing business occupancy assessment for tenants in a multi-tenant commercial property, he computes the assessed value of each tenant's property by reference to the assessed value of the entire property. Counsel for the Director argues that Section 7(2) of the Act requires the assessor to compute business occupancy by reference to the assessed value of the property occupied or used and the words "assessed value" in Section 7(1) of the Act refer to the total property value of the commercial property.

Counsel for the Respondent also referred the Board to the comments of Judge O'hearn of the County Court for District Number 1 in the case of Halifax Developments Ltd. v. Director of Assessment and the City of Halifax (1983), 55 NSR (2d) 455. Judge O'Hearn at Page 519 states:

> "(163 I find that Mr. Hardy's appreciation of the situation of the Trade Mart is more realistic than Mr. North's, but that does not mean that his valuation is acceptable without more. To use Mr. Hardy's capitalization rate, for example, would require an adjustment to the capitalization rate used in the rest of the complex, because I have accepted Mr. North's view that the complex should be valued as a whole on the basis of a single capitalization rate. The result in value is then apportioned on the basis of the capitalized net income and the leasehold improvements."

Counsel for the Respondent also referred the Board to the comments of Judge Lusby of the County Court for District Number Five in the case of The Director of Assessment v. Atlantic Shopping

Centres Limited and the Town of New Glasgow CP 07860 where at Page 7 of his decision Judge Lusby states:

> "Undoubtedly the economic rent method has become a recognized and valid one for use in proper cases. I think, too, that propriety of the method to be selected for business occupancy assessments of commercial premises in a mall must depend greatly on which method is used on the overall assessment of the mall itself. It seems to be only logical that if the economic rent method is used for the overall assessment, it should also be used for the computation of the business occupancy assessments."

Counsel for the Respondent submits that the assessor's method in computing the Appellant's business occupancy assessment is in agreement with the Assessment Act and with the case law cited by him.

Counsel for the Respondent submits the business occupancy assessment can be assessed jointly where there is more than one occupier. He referred the Board to the case of the Public Service Commission of Halifax v East Hants (supra) and the comments of Mr. Justice Coffin at Page 567:

> "Under the authorities, it is possible to have more than one person exercising some acts of occupation and the principle that occupation must be exclusive is subject to the modifications set out in the cases which I have mentioned."

Counsel for the Respondent also referred the Board to the case of Versa Food Services Limited v. The Town of New Glasgow and the Director of Assessment 1980 C.P. 06133 (unreported).

He submits that Judge Lusby, as part of the dicta of his decision, indicates that the value of common areas (a receiving area in that instance) should be apportioned for business occupancy assessment purposes to persons in proportion to their use of the common areas.

Counsel for the Respondent also submits that Section 7(3) of the Assessment Act refers only to "properties used as commercial pay parking lots and only in those cases where there is no known person or business operating or occupying the property." He submits that the Mic Mac Mall property is used for retail purposes and the parking of motor vehicles on the property is an ancilliary use to the main retail use of the property and therefore Section 7(3) has no application to this case.

Counsel for the Respondent further submits that the words "shall be deemed" in Section 7(3) of the Act are not conclusive but only create a rebuttable presumption. He submits that the presumption that the owner is the occupier has been rebutted by the evidence of the usage of the parking lot by the Appellant and its customers and the terms of the lease agreement granting the Appellant occupation of the parking lot in common with other tenants.

The first issue to be determined is whether the Appellant occupies or uses the Mall common areas and parking areas for business occupancy assessment purposes.

The nature of business occupancy tax was reviewed by McKeigan, C.J.N.S. in Minas Basin Pulp and Paper Company v. Director of Assessment (1979) 36 N.S.R. (2d) 496 where he stated at Page 502:

> " The business occupancy assessment tax here is a tax on the occupancy or use of the property and not a tax on property."

The meaning of the word "occupation" has been considered by the Appeal Division of the Supreme Court of Nova Scotia on previous occasions.

In the case of the Public Service Commission (supra) Coffin, J.A., in reviewing the law of "rateable occupation" stated at Page 462 and 463:

> "In Richmond v. Mersey Paper Co., 1948 2 D.L.R. 788, at p.796, Doull, J., quoted from 27 Hals. 2nd pp.351-3 where "rateable occupation" is discussed.
>
> The quotation ends with the words 'occupation, in order to be rateable, must be exclusive'.
>
> Doull, J., continued at pp. 796 and 797:
>
> 'A long discussion of occupation is found in Westminster Corp. v. Southern R. Co., 1936 A.C. 511. From this it is clear that what is material is not so much whether the person whose assessment is in question has the right to occupy the premises but but whether such person is de facto so occupying.'
>
> I was concerned with the word "exclusive" in the above quotation, but the extract from Halsbury's continues at p.353:
>
> ..'therefore, if more persons than one have rights in a hereditament, that person who has the right of regulation and control over the user of other persons enjoying subordinate rights is the rateable occupier.'
>
> In the Westminster Council case, Lord Russell of Killowen at p. 532 pointed out that the effect of alleged control must depend upon the facts, and in examining the degree of control, one must examine'... the extent to which its exercise would interfere with the enjoyment by the occupant of the premises in his possession for the purposes for which he occupies them, or would be inconsistent with his enjoyment of them to the substantial exclusion of all other persons'. . . . .
>
> . . . .

> In Cory et al. v. Bristow (1877), 2 A.C. 262, the lessee of a right to lay down certain moorings was found rateable. Lord Hatherley p.276 in considering whether or not the occupation was exclusive said:
>
> '.... the Courts have not meant by the term 'exclusively' that the interest may not be determined on certain terms and conditions, but merely that the person so occupying should have the right unattended by a simultaneous right of any other person in respect of the same subject matter'."

At Page 466, Coffin, J.A. states:

> "In my view the remarks of Lord Russell of Killowen in the Westminster case are particularly relevant.
>
> Under the authorities, it is possible to have more than one person exercising some acts of occupation and the principle that occupation must be exclusive is subject to the modifications set out in the cases which I have mentioned.
>
> It is clear that the watershed is necessary for the operations of the appellant commission and that any limited rights obtained by such companies as the Elmsdale Lumber Company are subordinate to the occupancy of the Commission. It was "enjoying" the use of the land for the purpose of its statutory objects and in my view was an "occupant" within the meaning of s.(1)(ja) of the Assessment Act."

And further at Page 467, Coffin, J.A. states:

> "In Holywell Union and Halkyn Parish v. Halkyn Drainage Company, supra, admittedly the factual situation was different from that on which the present appeal is based. There was a grant of certain drainage rights, but the general statements of law are applicable here.
>
> Lord Herschell, L.C., said at p.125:
>
> ' The question whether a person is an occupier or not within the rating law is a question of fact, and does not depend upon legal title. The person legally possessed may not occupy. On the other hand, a person may be occupier either with or without the consent of the owner'."

Also in the case of Riverport Seafoods Limited, (supra), Mr. Justice Hart stated at Page 284:

> " The extent to which it is necessary to exert control over property in order to fall within the classification of an occupant was recently discussed in Public Service Commission of Halifax v. East Hants, 33 N.S.R. (2d) 451; 57 A.P.R. 451."

Mr. Justice Coffin's comments were previously quoted at Page 32 of this decision.

While their Lordships' remarks were directed to the word "occupant", in the opinion of the Board, the principles expressed would apply equally to the word "use". The question of whether a person occupies or uses property for purposes of Section 7 of the Assessment Act is a question of fact and where more than one person exercises acts of occupation with respect to a property, it is necessary to examine the degree of control being exercised over the property by the persons occupying or using the property.

The Board has examined the lease between the Appellant and the landlord filed as Exhibit E-7. The Appellant, pursuant to Article 2, Section 2.01 of the Lease quoted at Page 13 of this decision, has a "right, easement, right-of-way and licence" in common with the landlord and other tenants of the shopping centre to use the Mall common areas and parking areas for purposes associated with its merchandising activity in the Mall. The Appellant is not demised a specific portion of the Mall common areas or parking areas for its own occupation or use but is granted a right, etc., to use all of the parking areas and common areas in common with other tenants and the landlord.

The landlord is responsible for maintaining and operating the Mall common areas and parking areas and recovering as additional rent from the Appellant and other tenants the cost of operating and maintaining the common areas and parking areas. There is nothing in the Appellant's lease which would permit the landlord to interfere with or be inconsistent with the enjoyment by the Appellant of the common areas and parking areas granted under the lease to the substantial exclusion of all other persons except the right of other tenants and the landlord to occupy or use the common areas and parking areas in a manner similar to the Appellant.

Certainly the nature of the Appellant's occupation or use of the common and parking areas under its lease is such that the Appellant does not have control over these areas to the substantial exclusion of all other persons. Because of this lack of control, the Appellant is neither occupying nor using the Mall common areas or parking areas within the meaning of Section 7(1) of the Assessment Act.

The Board agrees with the submission of Counsel for the Appellant that Section 7(3) of the Assessment Act applies to the parking areas surrounding the Mic Mac Mall and the owner of the Mall is the occupier of these areas for business occupancy assessment purposes. It follows that the Appellant, not being the owner of the parking areas surrounding the Mic Mac Mall does not occupy them for business occupancy assessment purposes.

The Board does not agree with the submission of Counsel for the Respondent that Section 7(3) applies only to commercial property used as a pay parking lot. The Board can only presume the intention of the Legislature by considering the words of the Statute. The words "Every assessed owner of commercial property used for parking motor vehicles shall be deemed to be the occupier of the property" are plain and unambiguous. If the Legislature intended that Section 7(3) applied to only commercial property operated as a pay parking lot, it presumably would have used words which would have expressed that intention. The Board disagrees with the submission of Counsel for the Respondent that the presumption created by Section 7(3) that the owner of commercial property used for parking motor vehicles is the occupier, has been rebutted. This is so because there was no evidence to prove that either the Appellant or the other tenants had sufficient occupation and control over the parking areas to bring them within the provisions of Section 7(1).

Section 7(2) of the Assessment Act sets out the method to compute business occupancy assessment and the applicable part of that section as it relates to the Appellant is as follows:

> " Business occupancy assessment shall be computed by reference to the assessed value of the property occupied or used as follows: . . . .
>
> (c) in a sum equal to fifty per centum of the assessed value for persons occupying or using property for a purpose not mentioned in or excluded from clauses (a) and (b)."

The Appellant does not occupy or use property in the Mic Mac Mall for a purpose mentioned in or excluded from Clauses 7(2)(a) and (b).

The business occupancy assessment computed by the Assessor is computed by reference to an assessed value which includes the value of the property occupied by the Appellant for its merchandising activity and a proportion of the value of the Mall common areas and parking areas. Section 7(2) requires that business occupancy assessment be computed by reference to the assessed value of the property occupied or used. Since the Board concluded that the Appellant does not occupy or use the Mall common areas or parking areas, its business occupancy assessment should not be computed by reference to an assessed value which includes a value attributable to those areas.

Assume the Appellant is considered an occupier in common with other tenants of the Mall common areas and parking areas. There are no provisions in the Assessment Act which enable an assessor to assess a person for business occupancy assessment for a proportion of the property occupied or used as the assessor has done. Likewise, it is unlikely the legislature intended that tenants in a shopping centre would each be liable for business occupancy assessment on the assessed value of the entire Mall common areas and parking areas. Whereas Section 7(3) of the Assessment Act deems parking areas of the Mall to be occupied by the owner for business occupancy assessment purposes, there is no statutory provision enabling the assessor to assess anyone the value of Mall common areas for business occupancy purposes.

The Board is still left with the determination of the assessed value of the property occupied by the Appellant. The Board accepts the opinion of Mr. North stated at Pages 18 and 19 of this decision that the assessed value of the Appellant's property should be $3,086,313.00. While Mr. North reached his opinion of value using the cost method, he stated that he would have reached the same opinion of value if he had used the income method. The assessor, Mr. Mills, agrees with the costs used by Mr. North in calculating the assessed value of the actual store premises used by the Appellant for its merchandising activity. If Mr. North had used the income method to calculate the assessed value of the actual store premises used by the Appellant for its merchandising activity, it would have differed from Mr. Mills' income method only with respect to the capitalization rate applied. Mr. North would not have applied a capitalization rate of 11% as the assessor did because " the characteristics of the income stream associated with the department store lease, together with consideration of the reliability of earnings and the relative security of the investment, would command a valuation process in which the net rental income would be discounted with a rate somewhat in excess of the yield which could be obtained on equivalent corporate bonds." According to Mr. North, as at January 1, 1980, high grade corporate bond yields were in the range of 12% to 13%. He stated that the investment community would surcharge this yield by 2 to 3% because of the non-liquidity of the investment. Therefore he would have capitalized the net income associated with the Appellant's lease with a rate in the area of 14%.

The Board agrees with Mr. North's opinion that a capitalization rate in the area of 14% is a more appropriate capitalization rate for the Appellant's premises in the Mic Mac Mall than the 11% rate used by the assessor.

The Board computes the business occupancy assessment of the

Appellant's property in the Mic Mac Mall as follows:

50% of $3,086,313.00 = $1,543,156.00 rounded to
$1,543,200.00

The Board therefore allows the appeal and reduces the business occupancy assessment of the Appellant's property located in the Mic Mac Mall, Dartmouth, Nova Scotia, for the 1982 assessment year from $1,815,800.00 to $1,543,200.00. The Appellant shall be entitled to its costs to be taxed by Mr. Arthur Hare, Q.C. of Halifax on a party and party basis on the County Court scale.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 9th day of November, A.D., 1984.

RHBlois
R.H. BLOIS, Chairman

ELIZABETH LAWRENCE, Vice-Chairman

Darryl W Wilson
DARRYL W. WILSON, Member

McKay v. Director of Assessment

ASSESSMENT-JURISDICTION--WHETHER POWER TO REVIEW ASSESSMENT APPEAL COURT DECISION DECLINING JURISDICTION--ASSESSMENT ACT, Ss. 65(2), 77(1), 78, 89(1), 91(1), 98, 99, 101--MUNICIPAL BOARD ACT, S. 4(b)

This is an appeal from a decision of the Regional Assessment Appeal Court, Hants Region which dismissed the Appellant's appeal on the grounds of the late filing of the Notice of Appeal. There is no evidence before the Board as to whether the Appellant's Notice of Appeal was filed late other than the decision of the Regional Court. The Appellant's Counsel filed a Post-Hearing Memorandum alleging facts which if correct would ostensibly indicate the Appellant's Notice of Appeal was given in time and therefore the Regional Assessment Appeal Court should have heard the Appellant's case on the merits.

HELD--The Board does not have jurisdiction to hear the appeal. It is dismissed without costs.

It is not necessary to allege the Notice to the Regional Court was in time as the issue before this Board is limited to a demonstration as to whether the Board has jurisdiction to review the Regional Court's decision. This Board, being a creature of the legislature of the Province of Nova Scotia, is limited in its powers by the provisions of the statute under which it was created, that is, the Municipal Board Act and by any other statutes or regulations of Nova Scotia. The specific statutory powers enjoyed by the Board do not include the power to review a decision of a regional assessment appeal court dismissing an appeal because of a lack of jurisdiction. Section 99 of the Assessment Act gives the Board some considerable concern as it clearly and unambiguously provides for an appeal to the Board from a "decision" of an assessment appeal court. The determination of the Assessment Appeal Court is a "decision", but the Board is of the opinion that the decision in question is not a decision contemplated by s. 99. The Regional Court has undisputed authority and power to determine its own jurisdiction. For this Board to assume jurisdiction to hear evidence as to whether the Regional Court properly and legally dismissed the Appellant's appeal to be heard on the merits would be in effect a judicial review, which is a function reserved to a superior court judge and beyond the jurisdiction of this Board. The Board does not have the power to determine whether the Regional Assessment Appeal Court was correct in declining jurisdiction. It is also to be noted that s. 101(1) of the Assessment Act requires the Board to "inquire into the matter de novo ..." Since no hearing on the merits was held by the Regional Court, the Board could not hear the matter "de novo", that is, over again from the beginning.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, ch. 14;

- and -

IN THE MATTER OF: An Appeal by RAYMOND McKAY from the decision of the Regional Assessment Appeal Court, Hants Assessment Region dated March 23, 1984, respecting land at Brooklyn, in the Municipality of the District of West Hants.

BEFORE: R.H. BLOIS, Q.C., Chairman

COUNSEL: BARRY J. ALEXANDER, LL.B, for the Appellant;

WILLIAM M. WILSON, LL.B, for the Director of Assessment.

DECISION

The Appellant by Notice of Appeal dated April 17, 1984, appealed the decision of the Chairman of the Regional Assessment Appeal Court, Hants Assessment Region, made March 23, 1984, which dismissed the Appellant's appeal on the grounds of the late filing of the Notice of Appeal. No reasons were given in the Court's decision, a copy of which was filed as Exhibit R-3. The Appellant had been given notice by the Recorder of the Regional Assessment Appeal Court dated March 14, 1984, advising the Appellant that the Court would hold a preliminary hearing on March 23, 1984. A copy of the Recorder's Notice was filed as Exhibit R-2. This Notice read in part as follows:

"If the Regional Assessment Appeal Court

> is satisfied that your property fall under Section 98(1), that Court may allow the appeal to be heard, at a time determined by the Chairman.
>
> Further, take notice that pursuant to Section 94 of the Assessment Act, should you fail to appear, the Court shall proceed and give a decision in your absence."

Section 98 of the Assessment Act, R.S.N.S. 1967, c. 14, reads as follows:

> "1) If any person shows, within sixty days from service of the notice of assessment by oath or affidavit on ex parte application, to the satisfaction of the Regional Assessment Appeal Court [regional assessment appeal court], that he has been prevented by absence, illness or other sufficient cause from appealing from the assessment, or from duly prosecuting his appeal, the Court [court] may grant such person a hearing and arrange a sitting of the Court [court] to hear the appeal; the Court [court] may impose such terms as to notice and service of documents as it considers proper.
>
> 2) Where the person proposing to appeal is not a resident of the Province, he may apply ex parte to the Regional Assessment Appeal Court [regional assessment appeal court], within ten days after the time for filing appeal under Section 78 for an order extending the time for filing an appeal for not more than ten days thereafter and the Court [court] may grant such person a hearing and arrange a sitting of the Court [court] to hear the appeal; the Court [court] may impose such terms as to notice and service of documents as it considers proper.
>
> 3) The Court [court] may sit at such time and place as it shall determine to hear and determine appeals authorized under this Section."

A hearing before this Board was held in the Court House at Windsor, on May 24, 1984, to hear argument by Counsel on the question as to whether or not the Board has jurisdiction to review the decision made on March 23, 1984, by the Regional Assessment Appeal Court.

The Appellant's Notice of Appeal was filed as Exhibit R-1 and reads in part as follows:

> " TAKE NOTICE that the Appellant hereby appeals to the Nova Scotia Municipal Board against the Decision of Robert O. Hebb, an Assessment Appeal Court Chairman, made on the 23rd day of March, A.D., 1984, that the Appellant did fail to file his Notice of Appeal of his assessment on time and thereby refused to hear the Appeal of the Appellant's assessment.
>
> The Appellant seeks an Order setting aside the Decision of Robert O. Hebb dated March 23, 1984, and directing the Regional Assessment Appeal Court to hear the Appeal on the merits or alternatively, requests the Nova Scotia Municipal Board to hear the merits of the Appellant's assessment appeal.
>
> The grounds for the Appellant's Appeal are as follows:
>
> 1. The Assessment Appeal Court Chairman erred in finding the Appellant filed his Notice of Appeal late.
>
> 2. The Assessment Appeal Court Chairman erred in refusing to hear the merits of the Appellant's Appeal of his assessment.
>
> 3. Such other grounds as may more fully appear at the hearing of the Appeal."

The hearing before the Board was confined to argument by Counsel on the question of the Board's jurisdiction. No evidence was submitted by either party.

It appears that the Regional Court had dismissed the Appellant's application to be heard made pursuant to the provisions of Section 98 of the Assessment Act and had thereby declined jurisdiction to hear the appeal. The Regional Court's decision filed as Exhibit R-3 related to fifteen appeals including that of the Appellant, Raymond McKay. The heading on Exhibit R-3 reads as follows:

> "Decision for Preliminary Hearing for
> Late Appeals - March 23, 1984, Hantsport,
> Windsor and West Hants."

Following the heading there are three columns; the first one listing the appeal number, the second the name of the Appellant and the third the "Decision". Under the third column there appeared either the words "allowed" or "dismissed".

In the case of the Appellant Exhibit R-3 lists three appeal numbers, namely 60-199-84; 60-200-84 and 60-201-84 and the word "Dismissed" appears in the third column opposite the name of Raymond McKay.

Presumably the Regional Court was of the opinion that the Appellant's Notice of Appeal was not filed within the time limit set out in the Assessment Act and the Court after giving the Appellant a Notice by certified mail that a "preliminary hearing" would be held on March 23, 1984, to determine whether or not a hearing of the Appellant's appeal would be held under the provisions of Section 98(1) of the Assessment Act, dismissed the appeal. It is the Regional Court's decision dismissing the Appellant's application under Section 98(1) that gives rise to the hearing before the Board.

There is no evidence before this Board as to whether in fact and in law the Appellant's Notice of Appeal was filed late other than the decision of the Regional Court in dismissing the appeal because of late filing.

Although there is no sworn testimony before the Board as to the precise date that the Appellant was served with a Notice of Assessment under the provisions of Section 65, s.s. (2) of the Assessment Act or as to the precise date that the Appellant's Notice of Appeal was given under the provisions of Section 78 of the Assessment Act,the Post-Hearing Memorandum dated June 13, 1984, submitted by Counsel for the Appellant in Part I entitled "Statement of Facts" states in part that:

> "The Appellant is the owner of three (3) properties assessed to him located at Brooklyn, Hants County, Province of Nova Scotia. The Notices of Assessment for the three (3) properties assessed to the Appellant are dated January 11, 1984. The Notices were received by the Appellant on January 14, 1984. On February 3, 1984, the Appellant filed his appeal of his assessments in the proper manner and the grounds for appeal stated he was appealing the valuation of his properties".

If these alleged statements of fact are correct then it would ostensibly indicate that the Appellant's Notice of Appeal was given in time and the Regional Assessment Appeal Court should have heard the Appellant's case on the question of the proper valuation of the Appellant's properties since the Notice of Appeal was apparently filed on the twentieth day after receipt of the Notice of Assessment. Section 78 of the Assessment Act allows an Appellant twenty-one (21) days after the service of the Notice of Assessment to file an appeal with the Regional Court. The Board does not consider the above-quoted statements as facts but only as alleged facts which may or may not be true. In the opinion of the Board it was not necessary for Counsel for the Appellant to allege the facts quoted above as the issue before this Board is limited to a determination as to whether or not this Board has jurisdiction on an appeal under Section 99 of the Assessment Act to review the Regional Court's decision which dismissed the Appellant's appeal and therefore denied assuming jurisdiction.

Section 99 of the Assessment Act reads as follows:

> "Any person aggrieved by a decision of the assessment appeal court, including the clerk on behalf of the town or municipality and the Director, may appeal therefrom to the Nova Scotia Municipal Board."

Counsel for the Appellant in his submission dated June 13, 1984, in Part II lists two issues as follows:

> "1. Does the Nova Scotia Municipal Board have jurisdiction to set aside the decision of the Regional Assessment Appeal Court with regard to the Regional Assessment Appeal Court's jurisdiction?
>
> 2. Does the Nova Scotia Municipal Board have jurisdiction to hear the merits of the appeal on valuation, or in the alternative does the Nova Scotia Municipal Board have jurisdiction to remit the issue of valuation back to the Regional Assessment Appeal Board for hearing?"

Counsel for the Appellant argues that:

> "there can be no question but the Appellant is a person aggrieved by a decision of the Assessment Appeal Court. The Appellant, Raymond McKay has been directly and adversely affected by the decision of the Regional Assessment Appeal Court not to hear his appeal on valuation."

He then refers to the powers of this Board as set forth in Section 101 of the Assessment Act which reads as follows:

> "101(1) The Nova Scotia Municipal Board shall inquire into the matter de novo, and shall examine such witnesses and take all

> such proceedings as are requisite for a full investigation of the matter.
>
> 2) On the appeal the Board shall have all the powers of the regional assessment appeal court."

He then refers to the powers of the Regional Assessment Appeal Court set forth in Sections 77(1) and 89(1) of the Assessment Act which read as follows:

> "77(1) Any person complaining that he has been wrongfully inserted in or omitted from the assessment roll or that his property has been undervalued or overvalued by the assessor or that his property has been wrongfully classified may give notice in writing to the recorder that he appeals from the insertion, omission, valuation or classification and shall give a name and address where notices may be served upon him by the recorder."
>
> "89(1) On any appeal, the Court may
>
> (a) confirm, reduce or increase the valuation of the property that is the subject of the appeal, and confirm, reduce or increase an occupancy assessment notwithstanding that the occupancy assessment was not appealed;
> (aa) dismiss the appeal;
> (b) add to the roll the name and assessment of any person left off the roll;
>
> (c) strike off the roll the name of any person wrongfully entered thereon;
>
> (d) transfer the assessment to the proper person when any property has been assessed in the name of a person who is not legally liable to be assessed therefor;
>
> (e) when any property has been assessed more than once, strike out the assessment that is improper or illegal;
>
> (f) change the classification of all or part of the property that is the subject of the appeal; and

> (g) correct any clerical errors made by the assessor in the assessment roll".

Counsel for the Appellant then submits that the Board "has all the powers and can make decisions which a Regional Assessment Appeal Court can make", and although it is not specifically stated in the Assessment Act that the Regional Court has the power to determine a preliminary issue of jurisdiction it is "without argument that the Regional Assessment Appeal Court does have the jurisdiction to make rulings on whether or not an appeal is properly before it." He goes on to argue that if the Regional Assessment Appeal Court has jurisdiction to make such a decision, then pursuant to Section 101(2) of the Assessment Act this Board has the right to hear an appeal from such a decision.

Turning now to issue number two, that is assuming the Board has jurisdiction to entertain the appeal, should this Board hear the appeal on the merits or should it be heard by the Regional Assessment Appeal Court, the Appellant's arguments are as follows. Counsel for the Appellant refers to the decision of the Appeal Division of the Nova Scotia Supreme Court in the case of Minas Basin v. The Director of Assessment (1980) 36 N.S.R. (2d.) 496 where MacKeigan C.J.N.S. delivering the judgment of the Court stated:

> "I agree with Judge McLellan that on an appeal from a 'decision' of the Assessment Appeal Court a County Court judge has plenary power as such a judge to determine all questions of fact and law relative to the assessment thus placed before him. I agree he is to 'inquire into the matter de novo' (s. 101(1)), so that, as he has said, "the whole matter of assessment is at large before the County Court, unfettered or unencumbered by any difficulties or defects which have gone on before.'"

Counsel for the Appellant argues that the Minas Basin case decision is applicable to the case at hand and that this Board on an appeal "should be unfettered or unencumbered by any difficulties or defects which have gone on before". He then concludes that this Board if it were to set aside the decision of the Regional Court would have two alternatives: (1) hear the merits of the appeal de novo or (2) remit the matter back to the Regional Court for hearing.

Counsel for the Appellant argues that the Board has the authority under Section 101(1) of the Assessment Act to hear the appeal on the merits de novo because by dismissing the appeal the Regional Court has also dismissed the Appellant's appeal on valuation. Alternatively, the Appellant states that it would be "satisfied" if the matter was sent back to the Regional Assessment Appeal Court for hearing.

The Appellant then argues that since the Board does not have rules respecting practice and procedure for assessment appeals, assistance may be gained from the Nova Scotia Civil Procedure Rules. Counsel for the Appellant referred to the decision of MacKeigan C.J.N.S. in the case of The Director of Assessment v. Thomas (1982) 51 N.S.R. (2d.) 537 wherein at page 538 the Chief Justice states that on an assessment appeal to the County Court, Section 101 of the Assessment Act permits the Court to inquire into a matter de novo and take all such proceedings as are requisite for a full investigation of the matter. The Chief Justice then stated that "The Appeal to County Court is thus a proceeding in the County Court which is subject to the Civil Procedure Rules except where an enactment otherwise provides".

Counsel for the Appellant then concludes that in the absence of any enactment "providing otherwise" the Civil Procedures do apply to this Board. Assuming that the Civil Procedure Rules do apply Counsel for the Appellant then refers to Rule 62.23(1)(d) and (e) which he cites as a rule which would authorize the Board either to hear the appeal on the merits or order a new hearing by the Regional Assessment Appeal Court.

Counsel for the Director submitted two memoranda to the Board. The first one is dated May 23, 1984, and was filed with the Board on the same date. The second one is undated and was filed with the Board on June 25, 1984.

The Director argues that the Regional Assessment Appeal Court:

> "determined that it was not able to hear the appeal because the Notice of Appeal had been served out of time and that sufficient reason did not exist for it to extend the time allowed by the Assessment Act for appeal. This decision on whether or not to exercise jurisdiction over the appeal by the Regional Assessment Appeal Court is not, it is submitted, open for review by the Nova Scotia Municipal Board. The Nova Scotia Municipal Board does not have power to determine whether or not the Regional Assessment Appeal Court ought to exercise jurisdiction in a particular matter and does not have the power to supervise the exercise of that jurisdiction by the Regional Assessment Appeal Court. Such supervisory capacity is and remains with the Nova Scotia Supreme Court. If the Regional Assessment Appeal Court improperly refused to exercise its jurisdiction then that decision is open to review on application for certiorari to the Supreme Court."

Counsel for the Director contends that the proper remedy for the Appellant if he wishes to challenge the decision of the Regional Assessment Appeal Court on the issue of jurisdiction is to apply to the Supreme Court by way of certiorari. He refers to a decision of his Honour Judge Peter O'Hearn, Judge of the County Court for District Number One in the case of Dexter v. Department of Municipal Affairs 49 N.S.R. (2d.) 1969. Judge O'Hearn at page 174 of that case after quoting from the decision of Graham, E.J., in Re Ruggles (1902), 35 N.S.R. 57, stated that:

> "I am therefore of the opinion that the statement of Graham, E.J., governs, and that this court cannot deal with the appeal on the grounds set forth in the Notice of Appeal, because certiorari is the appropriate remedy, and an appeal is not. On the other hand, if the appeal is to proceed, it can proceed only by way of a hearing de novo. The appeal will accordingly be quashed on the ground that this Court does not have jurisdiction to hear it."

In the Dexter case a mistake had been made in the valuation of property in a Notice of Assessment. An appeal to the Regional Assessment Appeal Court was filed by the Regional Director. The Regional Court held that there was not a proper Appellant before the court but on its own motion made pursuant to Section 91(1) of the Assessment Act raised the assessment to correct the error in the Notice of Assessment. The property owners appealed to the County Court which declined jurisdiction.

Counsel for the Director argues that because the Notice of Appeal was not served in time the Appellant had lost his right of appeal. He submits that whether or not the Regional Court was correct in not exercising jurisdiction is the subject matter of a certiorari application. He submits that "the Regional Assessment Appeal Court decided that they could not hear the appeal, that is the decision that is being appealed to the Municipal Board. The Municipal Board does not have a decision on the merits before it for review and does not have the power to remit the matter back to the Regional Assessment Appeal Court."

Counsel for the Director refers to the decision of this Board made on March 22, 1984, in the matter of an appeal by Philip Clay where the Board at page 8 stated:

> "...The only way such an issue may come before the Board is by way of an appeal under Section 99 of the Act from the decision of the Regional Court relating to the valuation issue. In the opinion of the Board, since no such decision was made, no appeal on the issue of valuation lies to the Board. The Board is unable to assume jurisdiction to hear the issue of valuation of the subject property."

Counsel for the Director summarizes his position on page 7 of his Pre-hearing Brief as follows:

> "The issue of valuation was not heard by the Regional Assessment Appeal Court or were any of the matters outlined in Section 89 of the Assessment Act, there is, therefore, no decision on the merits before the Municipal Board upon which they can be called upon to act. In fact all that was heard by the Regional Assessment Appeal Court was an application for a hearing under Section 98. The Board does not have power to cure procedural errors before the Regional Assessment Appeal Court. It is conceded that an administrative tribunal can determine whether or not, based on the facts before it, it is in a position to assume jurisdiction. These are preliminary matters which are within the competence of the particular Board to determine and which was done by the Regional Assessment Appeal Court. The Municipal Board cannot, it is submitted, determine whether or not the Regional Assessment Appeal Court was correct in declining jurisdiction. They do not have the inherent power to determine whether or not there was a valid appeal before the Regional Assessment Appeal Court. That power has not been given to them by Statute and it is properly reserved to the Supreme Court as part of their supervisory power over administrative tribunals."

The Board must first of all determine whether in the circumstances of this case it has jurisdiction to set aside the decision of the Regional Assessment Appeal Court. If the Board determines that it has such jurisdiction and after hearing evidence which would justify the Board in deciding that the appeal should be heard on the question of the proper valuation of the Appellant's property, the Board would have to decide whether it would hear the appeal on the merits or whether it should be heard by the Regional Assessment Appeal Court. If the Board determines that it has no jurisdiction to set aside the Regional Court's decision then it would not be necessary for the Board to make any further finding. The Appeal would be dismissed for lack of jurisdiction.

It is the Board's opinion that the Appellant is a person "aggrieved" by the decision of the Regional Assessment Appeal Court within the meaning of Section 99 of the Assessment Act and on a plain meaning of the provisions of Section 99 he would therefore appear to have the right to appeal that decision to this Board. The Board would then be obliged to inquire "into the matter de novo" pursuant to s.s. (1) of Section 101 of the Assessment Act.

On the other hand this Board being a creature of the Legislature of the Province of Nova Scotia is limited in its powers by the provisions of the statute under which it was created, that is, the Municipal Board Act, Statutes of Nova Scotia, 1981, c. 9 and by any other statutes of Nova Scotia or by the Governor-in-Council which may grant powers to the Board. Under Section 4(b) of the Municipal Board Act it is provided that "The

Board shall have such other powers and duties as are conferred upon it by an enactment or the Governor-in-Council". The specific statutory powers of a Regional Assessment Appeal Court are set out in s.s. (1) of Section 89 of the Assessment Act and these powers are listed on pages 7 and 8 of this decision.

s.s. (1) of Section 91 of the Assessment Act sets forth certain additional powers of the Regional Court as follows:

> "The Court may, of its own motion,
>
> a) add to the roll any property that has been omitted therefrom with the value thereof as determined by it and the name of the person to whom it should be assessed; and
>
> b) increase the amount of the valuation of any property."

As has already been mentioned on an appeal to this Board "the Board shall have all the powers of the regional assessment appeal court" by virtue of s.s. (2) of Section 101 of the Assessment Act.

The specific statutory powers enjoyed by the Board do not in the opinion of the Board include the power to review a decision of a regional assessment appeal court in dismissing an appeal because of a lack of jurisdiction as for example the late filing of a Notice of Appeal. However, the wording of Section 99 of the Assessment Act gives the Board some considerable concern as it clearly and unambiguously provides for an appeal to the Board from a "decision" of the assessment appeal court. The word "decision" is defined in Black's Law Dictionary 5th ed. as, "a determination arrived at after consideration of facts, and in legal context, law" and also as "a determination of a judicial or quasi judicial nature". It would therefore follow that the determination made by the Regional Assessment Appeal Court on March 23, 1984, was a "decision".

The issues raised in this appeal are novel ones and there does not appear to be any precise determination by any court of competent jurisdiction on these issues. The Board takes the view that the "decision" of the Regional Assessment Appeal Court dismissing the Appellant's appeal, presumably on the basis that the Notice of Appeal was not filed within the statutory time limit and that the circumstances were not such that the Regional Court would exercise its discretion under Section 98(1) of the Assessment Act to hear the appeal, is a decision which is not appealable to this Board under the provisions of Section 99 of the Assessment Act.

Section 99 of the Assessment Act reads as follows:

> "Any person aggrieved by a decision of the assessment appeal court, including the clerk on behalf of the town or municipality and the Director, may appeal therefrom to the Nova Scotia Municipal Board."

The Appellant is certainly "a person aggrieved by a decision of the assessment appeal court..." and as such he should ostensibly have the right to appeal to this Board the decision causing him to be aggrieved. However, the Board is of the opinion that the decision in question made by the Regional Assessment Appeal Court is not a decision contemplated by Section 99 of the Assessment Act which is appealable to this Board. The decision made by the Regional Assessment Appeal

Court was a decision relating to that Court's jurisdiction to hear the appeal on the merits and the Regional Court having undisputed authority and power to determine its own jurisdiction, exercised that authority by dismissing the appeal because of late filing of the Notice of Appeal and the Regional Court refused to exercise its discretion under Section 98(1) of the Assessment Act by allowing the appeal to be heard.

For this Board to assume jurisdiction to hear evidence as to whether or not the Regional Assessment Appeal Court properly and legally dismissed the Appellant's appeal to be heard on the merits would be in effect a judicial review of the Regional Court's decision which in the opinion of the Board is a function reserved to a superior court judge and is beyond the jurisdiction of this Board.

This Board has duties to perform which are set forth in the Municipal Board Act and in various statutes conferring jurisdiction on the Board. The Board's powers to carry out its duties are set forth in these various statutes. These powers do not include the power to review a decision of a Regional Assessment Appeal Court on a question of that Court's jurisdiction to hear an appeal.

The Board agrees with the submission of Counsel for the Director that this Board does not have the power to determine whether or not the Regional Assessment Appeal Court was correct in declining jurisdiction.

It is to be noted that on an appeal to this Board from a decision of the Regional Assessment Appeal Court the Board is required under the provisions of Section 101(1) of the Assessment

Act to "inquire into the matter de novo...". Since "de novo" is defined by the Oxford English Dictionary as "over again from the beginning" it appears that the matter must first be heard by the Regional Court before it could be heard by the Board "de novo". Since no hearing on the merits of the appeal was held by the Regional Court this Board could not hear the matter "de novo" that is, over again from the beginning.

The Appeal is therefore dismissed on the basis that this Board does not have jurisdiction to hear the appeal.

In the circumstances of this case the Board in the exercise of its discretion dismisses the appeal without costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 11th day of December, A.D., 1984.

R.H. BLOIS

Chairman, NOVA SCOTIA MUNICIPAL
BOARD.

Director of Assessment v. A.W. Peters Enterprises Limited

ASSESSMENT--COMMERCIAL--BUSINESS OCCUPANCY--BOWLING LANES--WHETHER ASSESSABLE PROPERTY--WHETHER BUILDINGS--WHETHER STRUCTURE--WHETHER ESTOPPED BY PROVINCIAL TAX COMMISION DECISION THAT CONSTITUTED TANGIBLE PERSONAL PROPERTY--ASSESSMENT ACT, Ss. 1(a)(v), 7(1), 101(1)

This is an appeal by the Director of Assessment from a decision of the Regional Assessment Appeal Court, Dartmouth Region reducing the 1983 commercial assessment of the Respondent's property at 4 Pine Street Extension from $615,000.00 to $493,200.00 and the business occupancy assessment from $307,500.00 to $246,600.00. The Assessment Appeal Court determined that bowling lanes are not assessable property under s. 1(a)(v) of the Assessment Act. The Board in a previous decision held that it had jurisdiction to hear such an appeal. Counsel were in agreement that the valuation of $110,200.00 for the bowling lanes was not in issue and that the issue was whether or not the bowling lanes in question are assessable property under s. 1(a)(v). The 26 wooden bowling lanes in question each weigh in the vicinity of 4½ to 5 tons and are not affixed to the building but rather lie on top of wooden cribwork by their own weight. A bowling lane can be manually moved after being cut into three sections and installed in another building. Bowling lanes are not normally moved and have a useful life of 40 years and upwards.

HELD--The appeal is allowed in part without costs and the 1983 commercial assessment of the Respondent increased by the value of the bowling lanes. The value of the lanes are not to be included, however, for business occupancy assessment.

As the appeal to the Board is by virtue of s. 101(1) of the Assessment Act a hearing de novo, the Board heard evidence from the assessor as to value. The Board accepts the assessor's undisputed valuation of $110,200.00. The sole issue to be decided is whether the bowling lanes in question are "assessable property" either as buildings or structures under s. 1(a)(v). The provision states that "assessable property" means among other categories "buildings and structures erected or placed upon, in, over, under or affixed to land". The Board agrees with the Director that it is not necessary to determine that bowling lanes after being installed are real property in order to determine they are "assessable property". The bowling lanes in question are not land or part of the realty or of the building in which they are located. The Supreme Court of Nova Scotia Appeal Division decision in Riverport Seafoods v. Director of Assessment supports the Director in his view that since 1977 the distinction for assessment purposes between real and personal property is no longer necessary in determining whether a fixture is assessable property. Bowling lanes are not "buildings" per se but it is not so clear whether in a given factual situation they do or do not become part of a building. Here the Board believes that the bowling lanes in question do not constitute a building or portion of a building, and are not assessable as such. The Board, however, is of the opinion that they are "structures" and by virtue of the fact that they are "placed upon" land are "assessable property" under s. 1(a)(v). In the Board's view the meaning of the words in s. 1(a)(v) is clear. On the question of business occupancy assessment,

s. 7(1) states it applies to "every person occupying or using any commercial property" except certain categories, including "structures other than buildings, not providing shelter for people, plant or moveable property, and all machinery, equipment, apparatus and installations other than those for providing services to buildings, whether or not the same are affixed to land and buildings". The bowling lanes in question come within this exception and therefore no business occupancy assessment shall apply to their value. The Respondent argues the Province is "estopped from claiming the lanes are assessable" because it previously classified them as tangible personal property and imposed a Health Services Tax in respect of them. However, there is no inconsistency between the decision by the Province to impose a Health Services Tax on personal property and the position of the Director that the lanes are assessable as structures. Even if the Board thought the lanes were part of the building, the Director would not be "estopped" because the Provincial Tax Commission determined they were tangible personal property.

NOTE: Application by A.W. Peters Limited for leave to appeal was denied by the Appeal Division of the Supreme Court of Nova Scotia. (See Supreme Court File No. S.C.A. 01402).

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, c. 14;

- and -

IN THE MATTER OF: An Appeal by the Director of Assessment from the decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region respecting the assessment of property owned by A.W. PETERS ENTERPRISES LIMITED located at No. 4 Pine Street Extension in the City of Dartmouth.

BEFORE: R.H. BLOIS, Q.C., Chairman,
ELIZABETH LAWRENCE, Vice-Chairman,
DARRYL WILSON, C.A., LL.B, Member.

COUNSEL: MARIAN F. TYSON, LL.B, for the Director of Assessment, Appellant,

JEFF SLIVOCKA, LL.B, for A.W. PETERS ENTERPRISES LIMITED, Respondent.

CLYDE A. PAUL, LL.B, for the Board.

DECISION

This is an appeal by the Director of Assessment from the decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region made on May 20, 1983, whereby the Court for the 1983 assessment year reduced the commercial assessment of the Respondent's property located at No. 4 Pine Street Extension in the City of Dartmouth from $615,000.00 to $493,200.00 and reduced the business occupancy assessment from $307,500.00 to $246,600.00. The Regional Assessment Appeal Court in its decision determined that bowling lanes are not assessable property under the provisions of Section 1(a)(v) of the Assessment Act, R.S.N.S. 1967, c. 14.

The Appellant's Notice of Appeal is dated June 16, 1983, and is filed as Exhibit P-1. It sets forth the following grounds of appeal, viz:

> "1. THAT the Regional Assessment Appeal Court erred in fact and in law in determining that the bowling lanes are not assessable property under Section 1 of the Assessment Act;
>
> 2. THAT the Regional Assessment Appeal Court wrongly reduced the assessed value of the subject property by the assessed value of the bowling lanes;
>
> 3. THAT the assessed value determined by the Regional Assessment Appeal Court is too low, and does not represent the market value of the subject property in accordance with Sections 38 and 39 of the Assessment Act;
>
> 4. Such other grounds that may appear from the evidence."

The hearing of the appeal was set down for October 17, 1983, at which date the Respondent submitted that the Board did not have jurisdiction to hear the appeal because the Board did not have the authority to determine whether or not bowling alleys located in the Respondent's building are assessable property under Section 1(a)(v) of the Assessment Act, R.S.N.S. 1967, c. 14 where "assessable property" is defined to mean "buildings and structures erected or placed upon, in, over, under or affixed to land".

The Board subsequently heard oral argument on this jurisdictional question on November 17, 1983 and counsel for both parties filed with the Board briefs on the jurisdictional question raised by the Respondent.

By decision dated May 14, 1984, the Board stated for the reasons set forth therein that it does have the power to determine whether property is assessable and assumed jurisdiction to hear the appeal on the merits. A hearing on the merits was subsequently held on June 22, 1984.

At the commencement of the hearing held on June 22, 1984, counsel for the parties were in agreement that the issue before the Board was whether or not the bowling lanes in the Respondent's building located at Civic No. 4 Pine Street Extension in the City of Dartmouth are assessable property under Section 1(a)(v) of the Assessment Act. The Respondent had appealed to the Regional Court the assessment relating to two properties in Dartmouth, 60 Tacoma Drive and 4 Pine Street Extension. Both of these properties contained bowling alleys or lanes. It would appear from the decision of the Regional Court filed as part of Exhibit P-5 that the Respondent's property located at 60 Tacoma Drive was not assessed for the value of the bowling lanes whereas the assessment of the Respondent's property at 4 Pine Street Extension included the value of $110,200.00 for the bowling lanes. The Regional Court concluded that "the bowling lanes in question are not assessable". The Court then reduced the Respondent's commercial assessment respecting 4 Pine Street Extension from $615,000.00 to $493,200.00 a reduction of $121,800.00 by accepting the assessor's valuation of $11,600.00 as a reduction to reflect the value of an easement over the property and the amount of $110,200.00 as a reduction representing the value of the bowling lanes.

Counsel were in agreement that the valuation of $110,200.00 for the bowling lanes was not in issue.

The only witnesses to testify were Thomas B. Mills, the assessor on behalf of the Director of Assessment and Allan W. Peters, the President of A.W. Peters Enterprises Ltd. on behalf of the Respondent.

Mr. Mills is employed as an assessor with the Department of Municipal Affairs in the Dartmouth Assessment Region. He was first employed as an assessor by the Municipality of the County of Halifax in 1974 and became an employee of the Province of Nova Scotia in 1976 when the Province assumed responsibility for all assessments in Nova Scotia.

Mr. Mills has completed all of the academic requirements of the Appraisal Institute of Canada and will be entitled to receive from that body the designation of A.A.C.I. upon completion of demonstration appraisal reports currently in progress. He has appeared regularly before the Regional Assessment Appeal Court and has appeared before the County Court and this Board in assessment appeal cases. He is qualified as an expert witness to give evidence on matters of assessment and appraisal.

Mr. Mills had assessed the subject property for the years 1981 to 1984 inclusive and had prepared a report for purposes of this hearing filed as Exhibit P-6. He stated that the bowling lanes in the subject property were assessed for the years 1982, 1983 and 1984 as a portion of the building as assessable property under Section 1(a)(v) of the Assessment Act. He stated that between 1978 and 1982 the lanes had not been assessed. He indicated that prior to the establishment of business occupancy assessment in 1978 the bowling lanes had been on the assessment roll categorized as personal property as at that time personal property, as defined in the Assessment Act, was taxable property subject to certain exceptions.

When asked to explain why the bowling lanes were assessed in 1982 under Section 1(a)(v) of the Assessment Act, Mr. Mills stated that in 1981 there was an addition made to the building and upon reviewing the file he realized that the bowling lanes had not been assessed. He then reviewed the file of the other free standing bowling alley in the City, the assessment of which did not include the value of the bowling lanes so he added the lanes to both assessment accounts as he considered the lanes to be assessable property once they had been installed.

Mr. Mills gave a detailed description of the subject building and the bowling lanes contained in the building which he said were the dominant feature in the building. The building itself was designed and constructed as a bowling alley and its present use is as a bowling alley. The original section of the building was constructed in 1961 and in 1981 a concrete block addition was built. Both sections of the building are on a 4" concrete slab.

Mr. Mills' appraisal report stated that the bowling lanes and approaches cover an area of 8800 square feet within the building or 64.3% of the area of the original section.

Mr. Mills explained that to the best of his knowledge the wooden bowling lanes are not screwed or bolted to the floor or the cribwork on which the lanes are placed. He said that each lane is 79' 4" in length and weighs in the vicinity of 4 to 5 tons. He stated that the lanes are moveable but to move them, they must be cut crosswise into three sections, tilted on their sides and manually removed from the building. Mr. Mills stated that the bowling lanes "would appear to be assessable property, that is, a structure which is placed upon the land for better enjoyment of the land". He said that the lanes "represent a special purpose element of the building which allows the utilization of the building for its purpose and they have become a part of the building once installed, similar to other elements of the building". He pointed out that although the lanes appear to be held in place by their own weight, in that respect, they are not unlike some other components of a building such as ceiling tile.

On cross-examination, Mr. Mills when asked how other assessors in the Province treat bowling lanes, responded that from his inquiries they are assessed in some regions and are not assessed in other regions.

On re-examination Mr. Mills indicated that he had obtained his valuation for the bowling lanes from a valuation manual published by Boeckh. This process did not include any valuation for the cribwork on which the lanes were placed. Mr. Mills indicated that it was his practice to assess wall to wall carpeting as part of a building even though it is physically possible to remove the carpet. He also indicated that doors and ceiling tile which are both readily removeable are assessed as part of the building.

Evidence was given by Allan W. Peters the President of the Respondent company. His company purchased the subject property in 1975 from the Beazley family and has operated the bowling alleys since that time. The original 20 lanes had been installed in 1961 but as a result of a flood in 1971 the original 20 lanes were replaced in 1971. He testified that when the Respondent purchased the subject property in 1975 the agreement of sale made provision for a breakdown of the purchase price into land, building, equipment, inventory and bowling lanes. In 1981, the Respondent added 6 "slightly used" lanes after extending the size of the subject building.

Mr. Peters testified that the original 20 bowling lanes in question were purchased by Beazleys Westphal Bowling Centre Limited from Brunswick of Canada Limited under an agreement of sale. This agreement relates to "20 only Basic Lanes, Gold Crown Style complete with gutters, divisions, kickbacks, outside pit ends with fibre inserts" along with certain other items of miscellaneous bowling equipment. A copy of this agreement undated and signed only by the purchaser was tendered as Exhibit P-10. Counsel for the Appellant did not object to the admission of this document in evidence but argued that it had no relevance and should not be given any weight by the Board. Counsel for the Respondent submitted that the purpose of the introduction of this agreement was to show that the vendor's intention was that the items described in the agreement were sold separate and apart from the realty.

Mr. Peters stated that when the Respondent purchased the building and equipment both the vendor and the purchaser considered that the bowling lanes were equipment. He stated that his firm's auditors when setting up books for the Respondent respecting the purchase of the Beazley building and equipment showed the value of the lanes as equipment and they were depreciated at a rate of 5%. He also stated that the Provincial Tax Commission assessed his company sales tax on the value of the wooden bowling lanes because they were considered to be equipment and therefore personal property rather than realty.

Exhibit P-11 is a copy of a letter dated August 26, 1977, from the Director of Health Services Tax Administration to the Respondent's auditors stating that the Provincial Tax Commission "has no alternative but to treat the transfer of this equipment as being a transfer of tangible personal property and therefore subject to Health Services Tax".

Mr. Peters testified that in addition to being the President of a company which owns and operates a bowling alley he is also the President of a company called Atlantic Bowling Services Limited that instals bowling lanes. This company has been in operation for four years and it instals bowling lanes and resurfaces lanes in bowling centres in the four Atlantic Provinces. He referred to seven photos shown in Exhibits P-12, P-13, P-14 and P-15 which were taken in 1981 after the addition to the subject building had been completed. The 2 photos in Exhibit P-12 show workmen in the process of removing 6 bowling lanes from a trailer in front of the subject property. These lanes were subsequently installed in the subject property. He stated that these lanes were previously located in Wolfville and purchased by his company. Each lane was then cut into three sections each being from 25 to 35 feet in length. Mr. Peters then explained how these sections are moved by sliding them one over another until they are in place in the building. The two photos in Exhibit P-14 show the various sections of the lanes standing on edge prior to being laid flat on supporting cribwork which is installed on the cement floor.

Mr. Peters explained that the bowling lanes when installed are not affixed to the cribwork but are simply secured by their own weight. When asked how difficult it is to remove bowling lanes Mr. Peters stated that they are easily removed. He then stated that bowling lanes were recently moved from the South Park Lanes in Halifax and were relocated to Saint John, New Brunswick. He indicated that the life of a bowling lane in a busy centre would be about forty years with sanding and refinishing taking place periodically.

Counsel for the Respondent asked Mr. Peters if it was ever his intention that the bowling lanes would become affixed to the realty and Mr. Peters stated that it was never his intention and if he were to sell them they would be sold separate from the realty.

Mr. Peters explained that the cribwork on which the bowling lanes rest is not affixed to the concrete floor. The cribwork is built on location in small sections. He stated that the gutters which run parallel to the lanes are usually screwed to the side of the lanes or to the top of the cribwork. At the end of each lane there is a steel plate weighing about 300 pounds which supports the pin setting equipment. These plates are not affixed to the floor.

As the appeal to this Board is by virtue of Section 101(1) of the Assessment Act a hearing de novo, the Board heard evidence from the assessor, Mr. Mills as to his determination of value for the subject property, the details of which are set forth in the assessor's report filed as Exhibit P-6. The valuation figures determined by the assessor were not disputed by the Respondent except as to the inclusion of the value of the bowling lanes in the market value of the entire property. The Board accepts the assessor's valuation of the bowling lanes in the amount of $110,200.00. This valuation as has previously been noted was not in dispute. The issue to be decided by the Board is whether the bowling lanes in question are "assessable property" either as buildings or structures under Section 1(a)(v) of the Assessment Act.

Both parties submitted post hearing briefs setting forth their respective views with regard to the issue before the Board.

Counsel for the Director filed a pre-hearing memorandum dated September 28, 1983, (Exhibit P-9) as well as a post-hearing memorandum dated July 12, 1984, in support of her argument that the bowling lanes, including gutters and ball returns are assessable property under Section 1(a)(v) of the Assessment Act.

The facts are not in dispute. The subject property comprises land upon which is erected a special purpose building used as a commercial bowling alley. The 26 wooden bowling lanes located in the building are an essential part of the physical elements required for bowling and were assessed under Section 1(a)(v) of the Assessment Act which states that "assessable property" means among other categories set out in Section 1(a) "buildings and structures erected or placed upon, in, over, under or affixed to land". The decision of the Regional Assessment Appeal Court removed the value of the lanes from the assessed value of the Respondent's property on the basis that the lanes are not assessable property under Section 1(a)(v).

The bowling lanes each weighing in the vicinity of 4½ to 5 tons are not affixed to the building but lie on top of wooden cribwork by their own weight. The wooden cribwork in turn lies on top of the concrete floor. A bowling lane may be manually moved after being cut into three sections, each one weighing approximately 1½ tons. It takes from 10 - 14 men to move a section of a lane. Lanes may be manually moved from one building and after being transported by trailer may be installed in another building. Normally the lanes are not removed from a building unless it is planned to use the building for a non-bowling alley purpose or they are so worn that they need to be replaced. Bowling lanes with periodic maintenance and repair have a useful life of 40 years and upwards.

Counsel for the Director cites the Ontario Court of Appeal case of Stack v. T. Eaton Co. (1902), 4 D.L.R. 335 as authority for the basic tests for distinguishing between personal property that has become real property and other personal property. These tests relate to the degree and object of the annexation to land of personal property articles and also to the intention of the person affixing the article to the land. She cites Haggert v. Town of Brampton (1897), 28 S.C.R. 174 as authority that even a slight attachment of a permanent nature is sufficient to make an article part of the realty. By permanent she means "remaining in place so long as it serves its purpose". She cites Haggert v. Bramton as authority that there need not be a physical attachment where the article is simply attached by its own weight. She argues that "intention to make an article part of the land is crucial to determining whether the article becomes part of the real property, but it is an intention to be implied from the circumstances surrounding the placing of the article upon the land." She cites Jones v. Lucas [1953]2 D.L.R. 221 (NSSC) in that regard. She argues that the degree of damage that will be caused by removal of the article is another factor considered by the courts in weighing the intention to make an article part of the realty.

Counsel for the Director cites cases to show that a freezing plant in a rink, wall to wall carpeting, and water and other utility pipes become part of the real estate and are assessable to the owner. (Kennebecasis Valley Recreational Centre Inc. v. Minister of Municipal Affairs (1975), 4 A.P.R. 303 (N.B.S.C.); LaSalle Recreations Ltd. v. Canadian Camdex Investmants Ltd. (1969), 4 D.L.R. (3d) 549 (B.C.C.A.); and Consumers Gas Co. v. Toronto (1897) 27 S.C.R. 453 (S.C.C.).).

Counsel for the Director argues that the Assessment Act includes "buildings or structures erected or placed" upon land as assessable property and therefore the common law distinction between real and personal property has to some degree been modified by virtue of the use of the word "placed".

Counsel for the Director referred the Board to the following statement of Lord Denning, M.R. in Field Place Caravan Park Ltd. v. Harding [1966] 3 All E.R. 247 (C.A.) at p.250:

> "The correct proposition today is that, although a chattel is not a rateable hereditament by itself, nevertheless it may become rateable together with land, if it is placed on a piece of land and enjoyed with it in such circumstances and with such a degree of permanence that the chattel with the land can together be regarded as one unit of occupation."

Counsel for the Director referred the Board to some case law where the term "structure" was judically defined. In

City of London v. John Labatt Ltd. [1954] 1 D.L.R. 441 (Ont. H.C.) Spence J. stated that "structure" is a very broad term. In Hobday v. Nicol [1944]1All E.R. 302 (C.A.) Humphreys J., at page 303 stated that "'Structure', as I understand it, is anything which is constructed; and it involves the notice of something which is put together, consisting of a number of different things which are so put together or built together, constructed as to make one whole, which then is called a structure."

The Ontario Court of Appeal decision in Assessment Commissioner for the Municipality of Toronto v. Eglinton Bowling Co. Ltd. [1957] O.R. 621 was cited by Counsel for the Director as a case where that Court considered the issue of whether bowling lanes are assessable. Laidlaw, J.A. at page 625 stated that the question for determination is whether or not the bowling alleys are "structures .... placed upon ..... land" within the scope and meaning of S.1(i) of the Assessment Act. His conclusion stated at pages 625-626 is as follows:

> " In my opinion, that question is resolved by the test and reasoning applied by Kellock J., speaking for the majority of the Court in Northern Broadcasting Company v. The Improvement District of Mount Joy, supra, at page 510. He directed attention to the definition of the word "placed" in the Shorter Oxford Dictionary - "to put or set in a particular place, position or situation". The test applied by the learned Judge appears to be whether or not the property in question was intended to remain in a particular spot "so long as they are used for the purpose for which they were placed upon the premises". There can be no doubt whatever that it was the intention of all interested parties to maintain the bowling alleys in the particular place and position where they were installed.

> They were placed in that place and position on the premises for the purpose of bowling and it was intended they should remain in that place and position so long as they were used for that purpose. While it may be possible as a structural operation to move the superstructure of the bowling alleys, I am satisfied that it was not intended to move that structure at any time during its period of usefulness. I hold, therefore, that the bowling alleys are land for the purpose of assessment and that they were legally assessed as such by the assessor."

Counsel for the Director then argues that because the bowling lanes are extremely heavy and are normally built on site suggests that they are part of the real estate. Although they are held in place by their own weight, they are the type of objects which may become part of the real estate. Also because the lanes are difficult to move and of necessity must be cut into three sections for moving purposes, some damage results to the lanes and this is another indication that the lanes have become part of the realty. Also the fact that the lanes benefit the property and adds to the enjoyment of the property is a factor. Without the lanes, the building would not serve its intended purpose. Furthermore, she argues that since the lanes are intended to remain permanently in place so long as the property is used for bowling purposes they cease to be chattels upon installation and become part of the realty.

Counsel for the Director submits that "it is not necessary to determine that the lanes become real property in order to find that they are assessable under the definition of assessable property in Section 1 of the Assessment Act, and we submit that the lanes are 'structures' which are erected or placed upon' land."

Reference to the comments of Judge O'Hearn in the case of Director of Assessment v. Halifax Developments Ltd. is made by Counsel for the Director where the Judge at p.45 in discussing the value of tenants improvements states that:

> " As long as these qualify as fixtures in the ordinary sense, that is, improvements added for the better enjoyment or exploitation of the realty, there can be no doubt that they are assessable and are assimilated to the 'land' because of the provisions of the Assessment Act."

Finally Counsel for the Director referred to Riverport Seafoods v. Director of Assessment (1981) 44 N.S.R. (2d) 282 where Hart, J.A. speaking for the Court stated at page 287 that:

> " Prior to the amendments to the Assessment Act in 1977, property subject to taxation was referred to as real or personal property. When it was necessary to determine whether a particular item was part of the real or personal property, the law as to fixtures as it had been developed by the courts over the years was of assistance. Now, however, the Act refers only to assessable property and no reference is made to fixtures in the definition section. It is therefore necessary for an assessor to include part of what may have previously been a fixture in determining the value of buildings and structures under paragraph 1(a)(v) and another part under 1(a)(vi) when valuing the manufacturing equipment. This was not done here where the assessor separated the "fixed equipment" and gave it an independent valuation."

Counsel for the Director submitted in her post-hearing brief that the copy of the agreement between Brunswick of Canada Ltd. as Seller, and Beazleys Westphal Bowling Centre Ltd. as Purchaser as well as the "Equipment Order" both filed as Exhibit P-10 "have no relevance whatsoever to the present case". She contends that "The documents are signed by one party only, and are not dated. We have no proof that the form or wording in the unsigned documents is the same as in any subsequent agreement entered into by the parties". She also points out that on page one of the Equipment Order a clause which provides for an instalment to be made on November 15, 1964 which is a date that obviously does not relate to the time when the Respondent purchased or installed lanes in the subject property.

Counsel for the Respondent in his post-hearing submission points out that when the Respondent purchased the subject property and equipment the lanes were transferred under a Bill of Sale and were assessed Provincial Sales Tax and were not included in the real property. He also pointed out that Mr. Peters testified that the Income Tax Department permits the Respondent to depreciate the lanes separately from the realty. He also referred to Mr. Peters' evidence that lanes are usually sold by means of a Bill of Sale and not as part of the realty and that the lanes are characterized as chattels for purposes of financing.

Counsel for the Respondent submits that "had the legislature intended to broaden the definition of 'structure' to include objects other than buildings and similar structures (lanes, fixtures, or similar things) Section 1(a)(v) of the Act would have been broadened. The Respondent submits that the definition found in Section 7 of the Act contemplates the inclusion of lanes, fixtures, apparatus and similar things while Section 1(a)(v) does not."

Section 7(1) of the Assessment Act states:

> "In addition to any assessment of property under this Act every person occupying or using any commercial property except:
>
> (a) forest property;
>
> (b) structures other than buildings, not providing shelter for people, plant or moveable property, and all machinery, equipment, apparatus and installations other than those for providing services to buildings, whether or not the same are affixed to land and buildings;
>
> (c) property of a municipal water utility, occupied by the utility;
>
> shall be assessed for a sum to be called business occupancy assessment."

Counsel for the Respondent submits that the parties are in agreement that the lanes are not "buildings" and the Respondent submits that the lanes are not "structures" intended to be included in the definition of "assessable property". He also contends that the term "structure" is indistinguishable from the term "fixture". He then submits that tests two, four and five set out in Stack v. T. Eaton Co. (1902) 40 D.L.R. 335, are not applicable inasmuch as the lanes are not affixed (except by their own weight) to the land. He then argues that there is an onus on the Director "to show that circumstances are such that the Respondent intended the lanes to become part of the land or circumstances arose that prima facie alter the character of the laws making them fixtures. The circumstances necessary to alter this presumption include evidence as to the degree of annexation and the object of the annexation patent for all to see".

Counsel for the Respondent referred to the LaSalle v. Canadian Camdex Investments Ltd. case cited by Counsel for the Director in her brief as a decision where wall to wall carpeting was held to be part of the realty. He argues that the court found as a fact that the degree of annexation was slight and then determined "that the object of the annexation of the carpeting to the hotel floor was for the better and more effective use of the building as a hotel and not for the better use of the goods as goods. He then submits that "the object of the annexation of the lanes to the realty in this case is for the better and more effectual use of the lanes as lanes and not for the better use of the realty."

The Respondent submits that "in accordance with the Stack tests there is no integration of the lanes into the premises, the annexation is by virtue of the resting of the lanes and not by any physical connection to the remainder of the premises and the object of the annexation (however slight) is for the more effective use of the goods and not the more effective use of the building."

Counsel for the Respondent submits that the evidence indicates that Section 1(a)(v) of the Assessment Act "is not capable of clear interpretation in this instance". He points out that Mr. Mills gave evidence that there is no uniformity in the Province with regard to whether bowling lanes are assessable. He then argues that the law "is clear if a taxing statute is vague or uncertain or if there is no definite intention of the legislature visible then no tax should be imposed on the taxpayer." He also argues that "any taxing statute must be interpreted in favour of the taxpayer and no tax levied unless the intention of the legislature is clear. He cites in that regard City of Winnipeg v. Sabourin et al (1980) 17 Man. L.R. (2d.) 323.

Counsel for the Respondent argues that the Director "is estopped from classifying the lanes as real property as a result of a previous classification of the lanes as chattels by the Provincial Tax Commission. We submit to the Board that the evidence presented by Mr. Mills and the case law indicates that the fundamental means of determining whether or not the property is assessable pursuant to Section 1(a)(v) of the Assessment Act is to determine first whether or not the item is realty or chattels. As indicated our contention is that "structures" in the Act means "fixtures". If this is so then the Provincial Tax Commission's classification of the lanes as chattels estops the Director of Assessment from assessing the lanes as real property under Section 1(a)(v) of the Act."

The following is an extract from the decision of the Chairman of the Regional Assessment Appeal Court which sets out his reasons for determining that the bowling lanes in question are not assessable:

> "I have no difficulty in accepting the law as laid down in Northern Broadcasting Company Limited v. The Improvement District of Mount Joy, [1950] S.C.R. 502, as approved in The Assessment Commissioner for the Municipality of Metropolitan Toronto v. Eglinton Bowling Company Limited, [1957] O.R. 620 (C.A.). The Eglinton case involved a question identical to the issue in the present case, the assessability of the bowling lanes as 'structures ....placed upon... land'. Laidlaw, J.A. concluded at page 625-6:
>
> > There can be no doubt whatever that it was the intention of all interested parties to maintain the bowling alleys in the particular place and position where they were installed. They were placed in that place and position on the premises for the purpose of bowling and it was intended that they should remain

> in that place and position so long as they were used for that purpose. While it may be possible as a structural operation to move the super-structure of the bowling alleys, I am satisfied that it was not intended to move that structure at any time during its period of usefulness. I hold, therefore, that the bowling alleys are land for the purpose of assessment and that they are legally assessed as such by the assessor.

Clearly, the conclusion reached by Laidlaw, J.A. is inconsistent with the evidence presented in the case of Mr. Peters. I am satisfied that the holding of that case is peculiar to the facts in evidence before the court, and that the case is not to be taken as laying down a rule of law that bowling lanes are assessable structures within the meaning of the act. I have therefore concluded that the bowling lanes in question are not assessable.

In reaching this conclusion, I have given due consideration to the words of Lord Denning, M.R., in Field Place Caravan Park Limited v. Harding, [1966] 3 All E.R. 247 (C.A.) at 250:

> 'The correct proposition today is that, although a chattel is not a rateable hereditament by itself, nevertheless it may become rateable together with land, if it is placed upon a piece of land and enjoyed with it in such circumstances and with such degree of permanence that the chattel with the land can together be regarded as one unit of occupation.'

The term 'structure' as used in Section 1(a)(v) of the Act was considered in City of London v. John Labatt Limited [1954] 1 D.L.R. 441 (Ont. HC):

> 'Structure' as I understand it, is anything which is constructed; and it involves the notion of something which is put together, consisting of a number of different things which are so put together or built together, constructed as to make one whole, which is then called a structure'.

On the evidence before me, I have concluded that the bowling lanes do not enjoy the degree of permanence which would make it such a part of the land or building as to lead a knowledgeable observer to conclude that it is 'one unit of occupation'. Nor is the wooden lane constructed of a number of 'different' things. It is made of identical pieces of lumber nailed together, and although large and cumbersome, is portable when required and does not meet the test of Denning, L.J. in Cardiff Rating Authority v. Guest Keen Baldwins Iron and Steel Company Limited [1949] 1 K.B. 385 (C.A.) at 396:

> 'A structure is something of substantial size which is built up from component parts and intended to remain permanently on a permanent foundation; but it is still a structure even though some of its parts may be moveable...A thing which is not permanently in one place is not a structure.'"

As has already been stated, the sole issue in this case is whether the bowling lanes located in the Respondent's building known as Civic #4 Pine Street Extension, Dartmouth, are "assessable property" within the meaning of Section 1(a)(v) of the Assessment Act which states that "assessable property" means (v) "buildings and structures erected or placed upon, in, over, under or affixed to land". The Board agrees with the submission made on behalf of the Director that it is not necessary to determine that bowling lanes after they have been installed in a building become real property or a portion of the real property in order to determine that the bowling lanes are "assessable property" within the meaning of Section 1.

However, for any property to be assessable under the definition in Section 1 the property must be that type of property included in the expression "buildings and structures erected or placed upon, in, over, under or affixed to land". "Property" is a word with a wide variety of meanings. "Black's Law Dictionary (5th ed) defines it in various ways including: "The exclusive right of possessing, enjoying and disposing of a thing", and "the word is also commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate." There is thus no question that bowling lanes are "property" but it is a much more difficult task to determine if they constitute a type of property which makes them "assessable" under the provisions of Section 1 of the Assessment Act.

It is the Board's opinion that bowling lanes are not "buildings" per se but it is not so clear whether in a given factual situation they do or do not become part of a building. It would appear that they are "structures" within the meaning of that word. Black's Law Dictionary defines a "structure" as "Any construction, or any production or piece of work artificially built up or composed of parts joined together in some definite manner. That which is built or constructed; an edifice or building of any kind. A combination of materials to form a construction for occupancy, use or ornamentation whether installed on, above, or below the surface of a parcel of land". Ostensibly, the bowling lanes in question would therefore appear to be "structures" and having been installed in the Respondent's building would come within the definition of "assessable property" whether or not they become part of the real property.

The decision of Spence J. in the Ontario case of Re Davis cited in the Respondent's brief is an interesting and informative case with respect to the tests to be applied in deciding whether bowling alleys should be considered part of the real estate and therefore their value included in the valuation of real property for the purpose of calculating dower but is not helpful in deciding the issue before the Board that is, whether the bowling lanes are assessable property. It does however support the Board's opinion that the lanes are not part of the realty. In the Davis case, Spence, J. decided that "the bowling alleys were not affixed for the better use of the building but in order that bowling might be more efficiently carried on, and I am ready to agree that these bowling alleys are not part of the real estate...".

Counsel for the Director relies in part on the decision of Laidlaw, J.A. of the Ontario Court of Appeal in the Eglinton Bowling Co. Ltd. case [1957] O.R. 621 in support of her argument that the bowling lanes are part of the subject building and are therefore land and are thus assessable. The decision of Laidlaw, J.A. in the Eglinton case states that "the bowling alleys are land for the purpose of assessment and that they were legally assessed as such by the assessor". The Board disagrees with the submission of the Director on this point on the basis that the bowling alleys in question although they are structures are not land, that is, part of the building. Although it is clear from the evidence of Mr. Peters that the lanes are not affixed to the building other than by their own considerable weight they are nevertheless moveable after being cut into three sections and may be manually removed from the building and installed in another building. The evidence of Mr. Peters is also clear that his "intention" as President of the Respondent company is that the lanes are not considered a part of the building and would normally be sold as personal property and be transferred by means of a bill of sale rather than by deed.

The decision of the Appeal Division of the Supreme

Court of Nova Scotia in the Riverport Seafoods v. Director of Assessment case (1981) 44 N.S.R. (2d) 282 supports the argument of Counsel for the Director that since 1977 the distinction for assessment purposes between real and personal property is no longer necessary in determining whether a fixture is assessable property.

Determination of whether for assessment purposes fixtures are real or personal property is no longer necessary as fixtures are not defined in the Assessment Act. Hart, J.A. speaking for the Court in the Riverport case states in part that "Now, however, the Act refers only to assessable property and no reference is made to fixtures in the definition section. It is therefore necessary for an assessor to include part of what may have previously been a fixture in determining the value of buildings and structures under paragraph 1(a)(v) and another under part 1(a)(vi) when valuing the manufacturing equipment."

The Board does not believe that the bowling lanes in question constitute a building or a portion of a building and are therefore not assessable as a part of the Respondent's building. Black's Law Dictionary (5th ed.) defines a building as a "structure designed for habitation, shelter, storage, trade, manufacture, religion, business, education and the like. A structure or edifice inclosing a space within its walls, and usually, but not necessarily, covered with a roof". All buildings are by definition structures but all structures are not buildings.

The Board however is of the opinion that the bowling lanes in question are "structures" and by virtue of the fact that they are "placed upon" land are "assessable property" under the definition of "assessable property" set out in Section 1(a)(v) of the Assessment Act. The parties to the appeal were in agreement that the amount of $110,200.00 represents the assessed value of the lanes for 1983. The Board therefore determines that the bowling lanes are assessable property and fixes their value at $110,200.00 for the year 1984 with the result that the commercial assessment of the Respondent's property is increased by $110,200.00 from $493,200.00 to $603,400.00.

Having determined that the lanes are assessable property it remains to be determined whether business occupancy assessment applies to the value of the lanes. The Assessment Act in Section 7(1) makes provision for "business occupancy assessment" to apply to "every person occupying or using any commercial property" except certain categories of property including those set out in Section 7(1)(b) viz: "structures other than buildings, not providing shelter for people, plant or moveable property, and all machinery, equipment, apparatus and installations other than those for providing services to buildings, whether or not the same are affixed to land and buildings". It is the Board's opinion that the lanes in question are structures other than buildings which come within the category of property excepted from business occupancy assessment under Section 7(1)(b) of the Assessment Act. Therefore, the Board determines that no business occupancy assessment shall apply to the value of the bowling lanes in question.

In coming to the conclusion that the bowling lanes in question constitute "assessable property" the Board has applied a meaning to the words of Section 1(a)(v) which appears clear. The lanes being structures but not buildings, having been "placed" on land are "assessable property". The Board disagrees with Counsel for the Respondent who argues that these words are not capable of a clear meaning and therefore the taxpayer, that is, the Respondent should be given the benefit of the doubt and should not be assessed and therefore not taxed.

In the result the commercial assessment of the Respondent's property located at No. 4 Pine Street Extension in the City of Dartmouth is increased from $493,200.00 to $603,400.00, the increase of $110,200.00 being solely attributable to the value of the bowling lanes. Since no business occupancy assessment applies to the value of the bowling lanes the business occupancy assessment for 1983 will remain in the amount of $246,600.00 being 50% of $493,200.00 ($603,400.00 - $110,200.00).

One further matter requires some comment. Counsel for the Respondent argues that the Province is "estopped from claiming that the lanes are assessable by virtue of its previously classifying the property as tangible personal property and imposed a tax upon the Respondent reflecting this". The Board is of the opinion that the Respondent is not able to invoke the law of estoppal against the Director simply because the Provincial Tax Commission imposed a Health Services Tax on the value of the Respondent's bowling lanes "as being tangible personal property" at the time of their purchase even though the Tax Commission's decision to impose the tax was upheld after an appeal to the Provincial Minister of Finance. There does not appear to be an inconsistency between the decision by the Province to impose a Health Services Tax on personal property and the position taken by the Director that the lanes should be assessed as structures under the provisions of the Assessment

Act where it is possible that structures may in some instances be in the form of personal property. Even if the Board was of the opinion that the bowling lanes are a part of the subject building and are therefore assessable under Section 1(a)(v) the Director would not in the opinion of the Board be "estopped" because the action of the Provincial Tax Commission in determining for purposes of Hospital Tax that the bowling lanes were tangible personal property.

The Board makes no award as to costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 12th day of December, A.D., 1984.

R H Blois
R.H. BLOIS

E Lawrence
ELIZABETH LAWRENCE

Daryl Wilson
DARRYL WILSON

Members, NOVA SCOTIA MUNICIPAL
BOARD.

Day v. Director of Assessment

ASSESSMENT--RESIDENTIAL--MARKET VALUE--MARKET DATA OR DIRECT SALES APPROACH--COST APPROACH--USE OF COMPARABLES WHERE MANY DIFFERENCES REQUIRING ADJUSTMENTS--FACTORS NOT CONSIDERED BY ASSESSOR

This is an appeal from a decision of the Regional Assessment Appeal Court, Halifax County Region reducing the 1984 assessment of the Appellant's property at Pope's Harbour from $31,800.00 to $29,000.00. The subject property is located on the north side of Highway 7 in a small community on the Eastern Shore of approximately 40 dwellings, about 15 miles west of Sheet Harbour, 29 miles east of Musquodoboit Harbour and 57 miles from the Halifax-Dartmouth Metropolitan area. The property has an area of 15,000 sq. ft. with 100 ft. frontage on Hwy. 7. The dwelling (originally constructed as a cottage) is 34' x 24' with 2 bedrooms, a basement, a dug well and septic system. There is a detached garage. The property was for sale for 7 months with no offers. In 1983 the property was listed with Montreal Trust for 2 months and received one verbal offer less than $25,000. The 1983 assessment was $19,800.00. Most residents in the community are retired or unemployed. The assessor estimated market value for assessment purposes using the market data or direct sales comparison approach and the cost approach. For the present hearing the assessor increased his estimate of value to $33,300.00 because his original assessment did not include a value for the heating system.

HELD--The appeal is dismissed without costs.

The Board cannot agree with the Appellant that the market value of the subject property should be $25,000.00 or with the assessor that the market value should be $33,300.00. The Appellant has not provided the Board with sufficient information to enable the Board to establish a market value below the market value set by the Regional Assessment Appeal Court. The property's past exposure to the market, which consisted mainly of an attempt by the Appellant to sell the property himself, is not by itself a conclusive indication of the market value. The Appellant pointed out certain defects in his property which were not considered by the assessor, however, the Board is not able to conclude these defects would reduce the market value below that fixed by the Assessment Appeal Court. The Board does agree with the Appellant that the adjusted sale prices of comparables chosen by the assessor should not be used because there were too many differences requiring adjustment to be a reliable indication of the market value of the subject property. The assessor's estimate of $33,300.00 by the cost method should be reduced because it does not take into account the repairs required to the septic system, the second-hand carpets, the use of used lumber and the cracks in the basement wall. The Board also agrees the assessor's estimate of land value is too high in light of the lack of demand for available land in Pope's Harbour and that the Appellant's lot is small. The proper value is $29,000.00, the same value set by the Assessment Appeal Court.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967 as amended;

- and -

IN THE MATTER OF: An Appeal by Floyd Day from the decision of the Regional Assessment Appeal Court Halifax County Assessment Region, dated April 4, 1984 respecting residential property at Pope's Harbour Halifax County.

BEFORE: DARRYL W. WILSON, C.A., LL.B.

COUNSEL: The Appellant Floyd Day was not represented by Counsel.

MARIAN F.S. TYSON, LL.B., for the Director of Assessment

DECISION

This is an appeal by Floyd Day from the decision of William Kydd, Chairman of the Regional Assessment Appeal Court, Halifax County Assessment Region, dated April 4, 1984 by which the 1984 assessment of the Appellant's residential property consisting of land, dwelling house and detached garage located at Pope's Harbour, Halifax County, was reduced from $31,800.00 to $29,000.00. The Appellant's Notice of Appeal is dated April 26, 1984 and it was received by the Board on April 30, 1984. There was no objection to the Board's jurisdiction to hear the appeal and the Board assumed jurisdiction to hear the merits of the appeal.

The hearing took place on Wednesday, July 4, 1984, in the meeting room of the Board of Trade Building, in Sheet Harbour, Halifax County.

The Appellant's Notice of Appeal states;

> " I am not satisfied with the April 3, 1984 Appeal Board decision at Sheet Harbour, Halifax Co. and wish to take this matter to the Provincial Board at your earliest date in Sheet Harbour, if possible.
>
> I will not give you further details unless you request them."

The subject property is located on the north side of Highway Number 7 in Pope's Harbour, Halifax County, a small community of approximately forty dwellings on the Eastern Shore of the Province. Pope's Harbour is bounded on the south by the Atlantic Ocean, on the west by the community of Tangier and on the east by the community of Spry Harbour. With the exception of a few dwellings, the area north of Highway Number 7 is woodland. Pope's Harbour is approximately fifteen miles west of Sheet Harbour, approximately 29 miles east of Musquodoboit Harbour and approximately 57 miles from the Halifax-Dartmouth Metropolitan area. The majority of the residents of Pope's Harbour are either retired or unemployed.

The subject lot has an area of 15,000 square feet with 100 foot frontage on Highway Number 7. According to the assessor, the land is generally level with a slight slope, however, the Appellant stated that the land is hilly and water runs into the garage and the basement of the dwelling. There is a stone wall at the front of the property which is falling down. A small area at the front of the lot is sodded while the remaining area is roughly cleared. The property has a dug well and a septic tank with a disposal field. According to Mr. Day, the septic tank is leaking and requires major repairs. He stated that he made temporary repairs in the Fall of 1983. According to the Appellant, when he installed the original septic system he only had room for 75' of tile for his disposal field and he needed room for 125'. The Appellant estimated the cost of a new septic system to be approximately $3,000.00 and the cost to repair his current system to be approximately $1,500.00.

The Appellant stated that he initially constructed the dwelling as a cottage and subsequently improved it to a permanent residence. He has been living permanently in the dwelling for the last six years.

In a typewritten report prepared by the Appellant which was filed with the Board as Exhibit D-4, the Appellant described the condition and location of his property as follows:

> "Property at Pope's Harbour.
>
> House----34 x 24, two bedrooms, Lot size 100 x 150, built with used lumber. 15000 sq.ft. lot with road frontage.
> Some repairs are needed. Large front window is leaking and has rotted front part of house. Basement is cracked in two places.
> Homemade furnace (wood) with one heat duct in living-room. Total cost of furnace was $400. No landscaped lawn in front or back of house. Garage is built of used lumber also. (size 28 x 22). Tarred paper on outside partly torn off.
> Property is one mile to nearest Service Station, open sometimes. 1½ miles to nearest Church, 2 miles to grocery store, closes at 8.00 p.m. House was for sale for seven months. No buyers or no offers. Property was assessed $19,800 in 1983, and the new assessment

> now $31,800., an increase of $12,000 in one year. Appeal Board Decision had taken off $2800. (It is now assessed at $29,000).
>
> The house is in a heavy welfare district, the largest in Halifax Co. I have no water frontage or no exit to any lake or salt water. The nearest property sold in Pope's Harbour was a 500 acre farm and the price was $80,000, including house, barn, woodland, salt water, and two road frontages.
>
> Who would give me $30.000 for this house under these conditions? I am sure no-one here would. If we had less $50.000 salaries in this county and stop buying cars and trucks for the welfare, we could have a better Tax System."

In addition, the Appellant stated that the brick chimney needs replacement, the oil furnace is not working and the carpets are, in fact, second-hand rugs. He also stated that in addition to personally advertising his property for sale, he listed the property with Montreal Trust in 1983 for two months and he only received one verbal offer for the property which was less than $25,000.00.

The Appellant stated that he planned to build a dwelling on the Mooseland Road in Pope's Harbour and that he hopes to sell the subject property for $25,000.00 but he has not been able to find a buyer willing to pay that price.

Evidence on behalf of the Director of Assessment was given by Francis A. Monk, an assessor with the Department of Municipal Affairs, Halifax County Assessment Region. Mr. Monk resides at East Ship Harbour, which is located approximately eight miles from Pope's Harbour. He has been employed as an assessor for approximately five years and he has been assessing property in the Pope's Harbour area during that period. Mr. Monk prepared an appraisal report filed as Exhibit D-3 in which he concludes:

> "It is considered that the market value of the subject property as of January 1, 1983, is thirty-three thousand dollars ($33,000.00)."

In estimating the value of the subject property for the 1984 assessment year, Mr. Monk relied upon data contained on the assessment records with respect to the subject property. He also inspected the subject property in late February 1984 in preparation for the Regional Assessment Appeal Court hearing and again in June 1984 in preparation for the present appeal. On both occasions he discussed the condition of the dwelling with the Appellant. He also visited the subject property in prior years as part of his duty of fixing the yearly assessment and in preparation for appeals of prior years' assessments to the Regional Assessment Appeal Court. Mr. Monk considers himself very familiar with the subject property.

Mr. Monk estimated the market value of the subject property for assessment purposes using the market data or direct sales comparison approach and the cost approach.

At Page 16 of his Appraisal Report, Mr. Monk states:

> " The Market Data Approach to Value is based on the Principle of Substitution. This principal states that no property will sell for more than a comparable substitute property available to the buyer. Actual sale prices of comparable properties that have sold within a reasonable time period and an arm's

> length transaction are analyzed. Adjustments and ratings are used to bring the comparable sales to the same condition as the subject property.
>
> Four property sales were selected to compare to the subject property.
>
> Adjustments had to be made because they were the only sales available to compare to the subject."

Mr. Monk selected four property sales to compare to the subject property. Sale No. 1, located in Owls Head Harbour, twenty-five miles west of the subject property, was sold in August 1982 for $33,000.00. The assessor made adjustments to the sales price of the comparable property for differences in location, house area, depreciation and garage from the subject property and arrived at an adjusted sales price of $33,300.00.

Sale No. 2, located on Cooper's Road, three miles west of the subject property, was sold on February 1982 for $55,000.00. Adjustments to the sales price of this comparable were made for differences in time of sale, lot area, house area, garage, heating system and depreciation. The adjusted sales price of this comparable was calculated to be $38,000.00.

Sale No. 3, located on Pinefall Drive, in Sheet Harbour, fifteen miles east of the subject property, was sold in November 1982 for $52,000.00. Adjustment to the sales price of this comparable were made for differences in location, house area, garage, depreciation and building style. The adjusted sales price for this comparable was calculated to be $32,500.00.

Sale No. 4, also located at Pinefall Drive, Sheet Harbour, was sold in April 1984 for $43,000.00. Adjustments to the sales price for this comparable were made for differences in time, location, house area, basement room, garage, fireplace, and depreciation. The adjusted sales price was calculated to be $30,000.00.

Mr. Monk stated at Page 20 of his report:

> " These adjustments show a range of value from $30,000.00 to $38,000.00 and carry considerable weight in the final estimate of value."

Mr. Monk also stated that the best comparable was Sale No. 1 located in Owls Head Harbour, "because of its close features to the subject both in size and geographic surroundings. Owls Head Harbour is approximately eleven miles off Highway Number 7 and twenty-three miles east of Musquodoboit Harbour where residents must go for medical, dental services and groceries. Employment is only available outside the community. Has all the same problems as residents of Pope's Harbour." Mr. Monk estimated the market value of the subject property using the direct sales comparison approach to be $33,300.00 being the adjusted sales price of the Owls Head Harbour property.

At Page 10 of his Appraisal Report, Mr. Monk states:

> " The Cost Approach to Value, like the Direct Sales Approach, has its derivation in the Principle of Substitute which affirms that when a property is replaceable, its value tends to be set at the cost of acquiring an equally desirable and

> valuable property, assuming no costly delay is encountered in making the substitution. Applied to the Cost Approach, the Principle involves the steps which follow, while in the Direct Sales Approach the Principle is applied by the determination of the cost of acquiring the substitute in the market place.
>
> Cost and value are not necessarily synonymous. Cost is defined as the amount of money necessary to produce a commodity, whereas value is thought of as the relationship between a thing desired and a potential purchaser. In the case of real estate, the difference between cost and value (if less than cost) is depreciation.
>
> The Cost Approach consists of four steps:
>
> (1) the estimate of site value, as if vacant
>
> (2) the estimate of the current cost of reproducing the existing improvements
>
> (3) the estimate and deduction of depreciation
>
> (4) addition of site value to depreciation reproduction cost of the improvements"

Mr. Monk estimated the market value of the subject property by the cost method to be $33,300.00 consisting of $2,600.00 for land, $2,500.00 for the well and septic system and $28,200.00 for the depreciated cost of the dwelling and garage.

In estimating the land value, Mr. Monk considered five land sales within six miles of the subject lot. Sale No. 1, located two miles east of the subject lot, has an area of 88,000 square feet and sold for $5,500.00 in May 1984. Sale No. 2, located 1½ miles west of the subject property has an area of 24,000 square feet and sold for $4,000.00 in August 1983. Sale No. 3

located in Spry Harbour, 3 1/2 miles east of the subject property has an area of 40,776 square feet and sold for $4,500.00 in September 1981. Sale No. 4, located in Spry Harbour, 3½ miles east of the subject property, has an area of 169,012 square feet and sold for $5,000.00 in November 1980. Sale No. 5, located 6 miles away in Spry Bay has 26,600 square feet and sold for $5,000.00 in April 1983. Mr. Monk adjusted the sales prices of these properties for the difference in lot size between them and the subject property. The adjusted sales price of these lots were $1,120.00 for Lot No. 1, $2,560.00 for Lot. No. 2, $1,665.00 for Lot No. 3, $380.00 for Lot. No. 4 and $2,796.00 for Lot. No. 5.

Mr. Monk did not make any adjustment for time differences "because of the inactivity of land sales". Mr. Monk stated that his analysis shows that "a purchaser will pay so much on a given date for a parcel of land, whether it was three years ago or today".

Mr. Monk considered Sale No. 2 to be the most comparable because "it had the least adjustments" and "geographically, closest to the subject property". Since Mr. Monk only adjusted the land sales for differences in lot size, the Board assumes that when he says "the least adjustment" he means the closest in land area to the subject property. Mr. Monk determined the land value for the subject lot to be $2,600.00 being the rounded value of Sale No. 2.

In determining the value for the dwelling and garage, Mr. Monk used the Nova Scotia Residential Assessment Manual. He placed the subject dwelling in a Class 3B category and the garage in a Class 6 category. He arrived at an estimated replacement cost of the dwelling in the amount of $33,794.00 and an estimated replacement cost of the garage in the amount of $3,139.00. He applied a physical depreciation rate of 10% and a locational obsolescence rate of 15% for both the dwelling and the garage. In arriving at a physical depreciation rate of 10% for the dwelling, Mr. Monk took into consideration the deterioration in the mortar between the chimney bricks, the leak in the frontroom window which had caused the sheathing to rot, cracks in the drywall and the need to paint the exterior and interior of the dwelling. The assessor applied a locational obsolescence rate of 15% because of the distance of the subject property from many essential services.

After deducting the value for physical depreciation and locational obsolescence, the assessor arrived at a depreciated reproduction cost of $25,854.00 for the dwelling and $2,400.00 for the garage.

Adding $25,854.00, the depreciated replacement cost of the dwelling, $2,400.00, the depreciated replacement cost of the garage, $2,500.00, the cost of the dug well and septic system and $2,600.00, the land value, the assessor arrived at $33,354.00 as the estimated market value of the subject property by the cost approach. He rounded this figure to $33,300.00.

Mr. Monk stated that he increased his estimate of the market value of the subject property by the cost method from

$31,800.00 which was the value he set for the 1984 assessment roll to $33,300.00 for the present hearing because his original assessment did not include a value for the heating system. According to Mr. Monk, there is an oil furnace installed in the subject dwelling although it was not working and required repairs. He estimated the value of this furnace to be $1,500.00.

The assessor stated that Mr. Day did not mention any problems relating to his septic system at the Regional Assessment Appeal Court hearing or at any time he questioned him about the condition of the property. The assessor also stated that he was not aware the dwelling was constructed with used lumber or that there were cracks in the basement wall and that the carpets were second-hand rugs.

The assessor stated that he would add 2% to the depreciation rate for the worn carpets and he would reduce the reproduction costs of the dwelling by $500.00 because it was constructed with used lumber.

The Appellant disagrees with the assessor's estimate of $2,600.00 as the value of his lot. The Appellant stated that he owns land on the Mooseland Road in Pope's Harbour which he is presently selling at $500.00 per lot without a survey and $1,000.00 per lot with a survey. According to the Appellant there is land available for purchase in Pope's Harbour but there are no buyers and the assessor's estimate of $2,600.00 is too high.

The Appellant also disagreed with the assessor's selection of four properties as comparable substitute properties to his property. He stated that none of the properties selected by the assessor as comparable were located in the community of Pope's Harbour and that the assessor could not properly compare properties in Sheet Harbour with properties in Pope's Harbour. He further stated that the assessor only selected expensive properties which sold to compare to his property and ignored the sale of four properties in Pope's Harbour which were not as expensive as his property. He also stated that the assessor ignored the sale of a 500 acre farm which included a house, barn, woodland, salt water and two road frontages located near his property in Pope's Harbour at a price of $80,000.00. According to the Appellant, if this property could only sell for $80,000.00, his property is not worth $30,000.00.

The Board cannot agree with the Appellant that the market value of the subject property for assessment purposes should be $25,000.00 or with the assessor that the market value should be $33,300.00.

The Appellant has not provided the Board with sufficient information which would enable the Board to establish a market value for the subject property below the market value set by the Regional Assessment Appeal Court. Although the Appellant indicated that the subject property has been offered for sale in the past, in the opinion of the Board, the property's past exposure to the market, which consisted mainly of an attempt by the Appellant to sell the property himself is not by itself a conclusive indication of the market value of the subject property. The Appellant pointed out certain defects in his property which were not considered by the assessor. However, the Board is not able to conclude that these defects would reduce the market value of the subject property below the value fixed by the Regional Assessment Appeal Court.

The Board recognizes the difficulty faced by the assessor in attempting to find properties comparable to the subject property because of the scarcity of sales in the area. However, the Board agrees with the Appellant that the adjusted sale prices of comparables chosen by the assessor should not be used to determine the market value of the subject property because there were too many differences requiring adjustments to the sale prices of the comparables between the comparables chosen and the subject property for those comparables to be a reliable indication of the market value of the subject property.

In the opinion of the Board, the assessor's estimate of $33,300.00 by the cost method should be reduced because it does not take in account the repairs required to the septic system, the second-hand carpets, the use of used lumber in constructing the dwelling and the cracks in the basement wall. The Board also agrees with the Appellant that the assessor's estimate of the land value is too high in light of the fact that there is a lack of demand for available land in Pope's Harbour and the size of the Appellant's lot is small, at 15,000 square feet, in comparison with most Municipal lots.

In the opinion of the Board, the proper value of the subject property for assessment purposes for the 1984 assessment year should be $29,000.00 being the same value set by the Regional Assessment Appeal Court.

The Board therefore dismisses the appeal without costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 17th day of December, A.D., 1984.

DARRYL W. WILSON

Ballou v. Director of Assessment

ASSESSMENT--CHANGE OF USE--FOREST PROPERTY--JURISDICTION--WHETHER CAN HEAR APPEAL OF REGIONAL ASSESSMENT APPEAL COURT DECISION ON JURISDICTION--WHETHER HEARING WOULD BE "DE NOVO"--NON-RESIDENTS ALLOWING TREES TO GROW WILD--ASSESSMENT ACT, Ss. 1(eb), 40B(1),(6),(11), 77, 78, 99, 101(1)

This is an appeal from a decision of the Regional Assessment Appeal Court, Antigonish-Guysborough Region confirming the imposition of a change in use tax of $320.00 respecting approximately 20 acres of property at Upper Springfield, Antigonish County. The Regional Court held it had no jurisdiction to hear the appeal because it involved the determination of a question of exemption. Counsel agreed that this Board has jurisdiction to hear the appeal and that it is properly before the Board.

HELD--The appeal is dismissed. The Board does not have jurisdiction to hear the merits of the Appellants' appeal.

The decision of the Regional Assessment Appeal Court was a decision relating to its jurisdiction and not a decision on the merits. A decision by the Regional Court relating to its jurisdiction to hear an appeal is not a decision contemplated by s. 99 of the Assessment Act as appealable to this Board. The fact that Counsel consented does not mean the Board has jurisdiction. It is the Board's responsibility in each matter to review its jurisdiction. It is the function of a Superior Court Judge and not of this Board to undertake a judicial review of the Regional Court's decision concerning jurisdiction. Also, the Board cannot hear evidence as to "whether the forest property ceased to be bona fide used or intended to be used for forestry purposes" because this would not be inquiring into the matter "de novo" as s. 101(1) requires. It is not inquiring "de novo" if the Regional Court did not hear the matter. Although the Board is without jurisdiction, it feels obliged to comment on the Regional Court's decision and on the issue of whether the subject land ceased to be bona fide used or intended to be used for forestry purposes. The Regional Court misinterpreted the Board's decision in the Philip Clay case. That case concerned a question of exemption from taxation and not, as here, a question of whether the land ceased to be bona fide used or intended to be used for forestry purposes. On the merits of the issue of a change of use, the Appellants bought land covered with trees that was part of a 100 ac. parcel subject to a Forest Management Agreement with the Department of Lands and Forests. Upon conveyance the land was removed from the Agreement. The Appellants do not reside in N.S., have not visited the subject land, and have no association with the forestry industry. They intend to allow the trees covering the subject land to grow wild. Allowing trees to grow wild on land is not using the land for forestry purposes. There must be come indication of management of the timber.

NOTE: Application by William Ballou for leave to appeal was granted by the Appeal Division of the Supreme Court of Nova Scotia. (See Supreme Court File No. S.C.A. 01496).

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967 Chapter 14, as amended;

- and -

IN THE MATTER OF: An Appeal by WILLIAM BALLOU and ROBIN BALLOU from the decision of the Regional Assessment Appeal Court, Antigonish-Guysborough Assessment Region respecting a change in use of their forest property.

BEFORE:	DARRYL W. WILSON, C.A., LL.B.
COUNSEL;	DANIEL J. MACISAAC, LL.B. for the Appellant
	WILLIAM WILSON, LL.B. for the Director of Assessment

DECISION

This is an appeal by William Ballou and Robin Ballou from a decision of the Regional Assessment Appeal Court, Antigonish-Guysborough Assessment Region made May 27, 1984 whereby that court confirmed the imposition of a change in use tax of $320.00 pursuant to Section 40B(6) of the Assessment Act, R.S.N.S. 1967, c.14, as amended, respecting approximately 20 acres of property located at Upper Springfield, Antigonish County.

The hearing of the appeal took place on July 30, 1984, in the Council Chambers of the Municipality of the County of Antigonish.

The Appellants' Notice of Appeal is dated June 11, 1984 and it was received by the Board on June 14, 1984.

The grounds of appeal stated in the Notice of Appeal are as follows:

> "(a) The Learned Chairman erred when he found he had no jurisdiction to hear the appeal in view of the very express statutory authority giving him power to hear the appeal and more particularly Section 40B(11) which reads as follows:
>
> > "An assessment under subsection (6), a determination that land has ceased to be bona fide used or intended to be used for forestry purposes and a determination of acreage under subsection (2) may be appealed in accordance with Sections 77 and 78.";
>
> (b) The Learned Chairman erred when he did not classify the property as forest property;"

A copy of the Decision of the Regional Assessment Appeal Court was filed as Exhibit B-2. The Decision reads as follows:

> "DECISION: THE Appellant appeared by Dan MacIsaac. The lot in question was received by the appellant on a swap of land, they traded agricultural land exempt for land that was forest resource exempt. Under s.40B a change of use tax is applicable when land bona fide used or intended to be used for forestry purposes ceases to be so used.
>
> THE issue here is whether the land can be exempt as forest property, bona fide used or intended to be used for forestry purposes. The jurisdiction of the Court, among other matters, is to determine value and classification of property. Under s.25(1) property must be either residential, commercial or resource. This land is property classified as forest resource. Is it exempt? In the Assessor's opinion it is not - not being bona fide used for forestry purposes. Applying the recent Nova Scotia Municipal Board case (Philip Clay and the Director of Inverness, Victoria-Richmond Assessment Region) the Board in a decision filed March 22, 1984 decided the Regional Assessment Appeal Court has no jurisdiction to determine exemption and the application for exemption must be made pursuant to s.108(1) of the Assessment Act, and referred to the Supreme or County Court. I therefore confirm the present assessment."

This decision raises certain questions with respect to this Board's jurisdiction to hear the appeal although there was no objection to the Board's jurisdiction raised at the hearing. In fact, Counsel for the Director agreed that the appeal was properly before the Board. The Board then heard evidence and argument with respect to the issue of whether forest property ceased to be bona fide used or intended to be used for forestry purposes.

The fact that Counsel consented to the Board's jurisdiction to hear an appeal does not mean that the Board actually has jurisdiction to hear the appeal. It is the Board's responsibility in each matter to review its jurisdiction. Subsequent to the hearing and on closer examination the Board has concluded that it did not have jurisdiction to hear the appeal.

In the opinion of the Board the decision of the Regional Assessment Appeal Court was a decision relating to its jurisdiction and not a decision relating to the matter under appeal. Although the Regional Assessment Appeal Court as part of its decision confirmed the assessment, which might suggest it made a decision on the matter under appeal, in the opinion of the Board, that part of the decision was unnecessary since by declining jurisdiction to hear the appeal the assessment is still in effect.

Section 99 of the Assessment Act reads as follows:

> " Any person aggrieved by a decision of the assessment appeal court, including the clerk on behalf of the town or municipality and the Director, may appeal therefrom to the Nova Scotia Municipal Board."

In the opinion of the Board, a decision made by the Regional Assessment Appeal Court relating to its jurisdiction to hear an appeal on the merits is not a decision contemplated by Section 99 which is appealable to this Board.

The Appellants' first ground of appeal is that the Regional Assessment Appeal Court erred by finding that it had no jurisdiction to hear the merits of the appeal. If this Board heard evidence with respect to this ground of appeal it would be in effect undertaking a judicial review of the Regional Court's decision which in the opinion of the Board, is a function of a Superior Court Judge and not a function of this Board on appeal pursuant to Section 99 of the Assessment Act.

The Appellants' second ground of appeal is that the Regional Assessment Appeal Court erred by not classifying the property as forest property. This is not a valid ground of appeal since the subject property would remain forest property even if the Regional Assessment Appeal Court allowed the appeal. The Board assumes that what is meant by this ground of appeal is that the forest property did not cease to be bona fide used or intended to be used for forestry purposes.

Section 101(1) of the Assessment Act states that "the Nova Scotia Municipal Board shall inquire into the matter de novo....". The Oxford English Dictionary defines "de novo" as "over again from the beginning." Since the Regional Assessment Appeal Court did not hear the matter, that is, "whether the forest property ceased to be bona fide used or intended to be used for forestry purposes" this Board could not hear the matter "de novo", that is, over again from the beginning. Therefore the Board has no jurisdiction to hear evidence with respect to the Appellants' second ground of appeal.

These issues were recently discussed in a decision of the Board made December 11, 1984 on an appeal by Raymond MacKay. This Board agrees with the conclusions reached in that decision.

Although the Board has declined jurisdiction to hear the merits of the Appellants' appeal, it feels obliged first to comment on the decision of the Regional Assessment Appeal Court since that court misinterpreted the Board's decision in the Phillip Clay appeal and secondly to give its opinion on the issue of whether the subject land ceased to be bona fide used or intended to be used for forestry purposes because it heard evidence on that issue.

The Judge of the Regional Assessment Appeal Court citing a decision of the Municipal Board made March 22, 1984 in an appeal by Phillip Clay held that he had no jurisdiction to hear the appeal because the issue raised was a question of exemption of taxation. With respect, the Clay case has no application to the present appeal. The Clay case involved an appeal by Mr. Clay of the resource classification of his property for the 1983 assessment year pursuant to Sections 77 and 78 of the Assessment Act. Mr. Clay argued on appeal that his property should be classified as forest resource exempt and not forest resource general because it was bona fide used or intended to be used for forestry purposes. The Board held that there are only three classifications of property for assessment purposes, namely: residential, commercial and resource including farm property and forest property. Forest property may be partly exempt from taxation pursuant to Section 40B(1) of the Assessment Act which reads as follows:

> "40B(1) All forest property bona fide used or intended to be used for forestry purposes shall be exempt from taxation under this Act or any other public or private Act of the Legislature authorizing a tax on the assessed value of property, except as provided in this Section."

In the opinion of the Board, Mr. Clay's argument was considered to be a question of exemption from taxation and not a question of classification.

The present appeal concerns an assessment for a change in use of the subject property and the issue raised in this appeal is whether the subject property ceased to be bona fide used or intended to be used for forestry purposes. That is a matter which is clearly within the jurisdiction of the Regional Assessment Appeal Court and the Municipal Board pursuant to Section 40B(11) of the Assessment Act which reads as follows:

> "40B(11) An assessment under subsection (6), a determination that land has ceased to be bona fide used or intended to be used for forestry purposes and a determination of acreage under subsection (2) may be appealed in accordance with Sections 77 and 78."

With respect to the merits of the appeal, the only person called as a witness during the hearing was Mr. John MacLellan, a Senior Assessor in the Antigonish-Guysborough Region. The facts are not in dispute.

The subject land, comprising approximately 20 acres, is covered with hardwood and softwood trees with a few alders growing at the front of the lot. The property is located in Upper Springfield, Antigonish County, approximately 35 kilometers from the town of Antigonish. The Upper Springfield area is mostly wooded land with a few commercial blueberry fields.

The Appellants, who reside in the state of Colorado, United States of America, acquired the subject property from Hugh James Sullivan by Deed dated May 13, 1983 which was subsequently recorded at the office of the Registry of Deeds, Antigonish County on May 25, 1983. The Appellants conveyed a lot of land, hereinafter referred to as the blueberry land, also located at Upper Springfield, Antigonish County to Mr. Sullivan in exchange for the subject land. Before the exchange of properties, the blueberry property was farm resource property,exempt from taxation while the subject property was forest resource property,exempt from taxation.

The Appellants do not reside in Nova Scotia: They have not visited the subject land: They do not have any association with the forestry industry and there has not been any forestry related activity on the subject property since they acquired it.

Mr. Sullivan is a local business man. He has been involved in the forestry industry in the past. When he owned the subject land it was part of a 100 acre parcel of land that was subject to a Forestry Management Agreement with the Department of Lands and Forest. When Mr. Sullivan conveyed the subject land to the Appellants,the subject land was removed from the Forestry Management Agreement and Mr. Sullivan was released from further obligations under the agreement.

The Antigonish-Guysborough Assessment Region became aware of the change in ownership of the subject land sometime after May 28, 1983 when the Appellants' deed was recorded. A notice of an assessment of a change in use tax with respect to the subject property was prepared on August 8, 1983 but it was not forwarded to the Appellants until December 16, 1983.

The assessor valued the subject land for change in use purposes at $1,600.00. The Appellants agree with this valuation.

In closing argument, Counsel for the Appellants stated:

> " In the case at bar, William D. and Robin Ballou own a property which is completely wooded comprising about 18 acres at Upper Springfield, in the County of Antigonish, Province of Nova Scotia. If the property was completely covered by marihuana, I doubt that anyone would suggest that it was not being used for growing marihuana. In the case at bar, the property is completely covered by trees. If the property has any future use, it is presently being used for growth of trees. If there was any change-in-use, it seems that the trees would have to be cut and sold before any change-of-use would take place."

Counsel for the Appellants also submits that the subject property could still be bona fide used or intended to be used for forestry purposes without being subject to a Forestry Management Agreement.

Counsel for the Director submits that merely having ownership of forest property is not sufficient to have the forest property partly exempt from taxation pursuant to Section 40B(1) of the Assessment Act. He submits that if ownership is the test to determine if forest property is bona fide used or intended to be used for forestry purposes, there would not be any need to have separate categories of forest property such as taxable and exempt forest property.

Counsel for the Director also submits that prior to the Appellants acquiring ownership of the subject property, it was correctly exempted from taxation pursuant to Section 40B(1) of the Assessment Act because Mr. Sullivan was engaged in the forestry industry and the property was subject to a Forestry Management Agreement. He submits that when Mr. Sullivan conveyed the subject property to the Appellant, the land ceased to be bona fide used or intended to be used for forestry purposes because the Appellants were not involved in the forestry industry, did not have any association with the area and were not actively managing the property for forestry purposes.

The issue to be determined on the merits is whether the subject land ceased to be bona fide used or intended to be used for forestry purposes.

Forest property is defined in Section 1(eb) of the Assessment Act as follows:

> " "forest property" means any lot of land, excluding any buildings or structures thereon, not used or intended to be used for residential or commercial or industrial purposes or any combination of such purposes;"

The subject lands are "not used or intended to be used for residential or commercial or industrial purposes or any combination of such purposes." By definition and by agreement of Counsel, the subject lands are forest property. In fact, an open field may qualify as forest property pursuant to the definition of forest property in Subsection 1(eb).

The basis of the submission of Counsel for the Appellants is that since the forest property physically remained unchanged after the conveyance to the Appellants and continues to be used for the growth of trees, the forest property is still being used for forestry purposes.

Forestry is defined in the Oxford English Dictionary as follows:

> "the science and act of forming and cultivating a forest; management of growing timber."

The trees on the property are presently growing wild and it is the Appellants' intention to permit the trees to continue to grow wild. In the opinion of the Board, allowing trees to grow wild on land is not using the land for forestry purposes. There must be some indication of management of the timber. In the opinion of the Board, the subject land ceased to be bona fide used or intended to be used for forestry purposes when the land was conveyed to the Appellants. If the Board had jurisdiction to hear the appeal on the merits, it would have confirmed the assessment of the change in use tax imposed under Section 40B(6) of the Assessment Act in the amount of $320.00 (20% of $1,600.00).

In the result, the appeal is dismissed because the Board does not have jurisdiction to hear the appeal.

The Board does not award costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 19th day of December, A.D., 1984.

Darryl Wilson

DARRYL W. WILSON

MUNICIPAL BOARD DECISIONS

VOLUME [illegible]

MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

R.H. BLOIS, Q.C. — Chairman

ELIZABETH LAWRENCE — Vice-Chairman

DARRYL WILSON, C.A., LL.B. — Member

* * * *

DEBI KARREL, B.P.E. — Clerk
CLYDE A. PAUL, LL.B. — Counsel

THIS VOLUME CONTAINS ALL PLANNING, MUNICIPAL BOUNDARY AND OTHER DECISIONS (EXCEPT ASSESSMENT) FROM JANUARY 1, 1984, TO DECEMBER 31, 1984.

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981.

DISCLAIMER RE: HEADNOTES

This volume of the 1984 decisions of the Nova Scotia Municipal Board contains Headnotes which summarize the decisions. These Headnotes are not part of the decisions. The Municipal Board while it has authorized and approved of the publication of these Headnotes assumes no responsibility for the content or the accuracy of the Headnotes.

MUNICIPAL BOUNDARIES

CASE TABLE

Application by the Town of Bridgewater to annex 14.78 acres near the William Hebb Road (Pine Street) within the Municipality of the District of Lunenburg
Re Bridgewater 1

Application by seven ratepayers of the Town of Oxford to annex an area of land within the Town of Oxford to the Municipality of the County of Cumberland
Re Oxford Ratepayers 29

STATUTE TABLE

Municipal Boundaries & Representation Act R.S.N.S. 1967 c. 195

s.8; 31(1)

Re Bridgewater 1

s.8; 18(1),(2)

Re Oxford Ratepayers 29

SUBJECT TABLE

Municipal Boundaries - Annexation Application by ratepayers of area of Town for annexation to county - factors to take into account.
Re Oxford Ratepayers 29

Municipal Boundaries - Annexation Application by Town to annex 14.78 acres in County - factors to consider - whether annexation need be both necessary and expedient - whether annexation was expedient.
Re Bridgewater 1

PLANNING

CASE TABLE

Antigonish, Draper et al v.	55
A.T.C. Properties Limited v. Halifax	205
Bridgewater, Junkin v.	79
Calvi v. Pictou	277
Cape Breton County, Pioneer Ready Mix Limited v.	355
Charbonneau et al v. Halifax County	321
Chester, Nash v.	405
Draper et al v. Antigonish	55
Fidelity Financial Corporation Limited v. Halifax County	299
Francis v. Halifax	145
Halifax, A.T.C. Properties Limited v.	205
Halifax County, Charbonneau et al v.	321
Halifax County, Fidelity Financial Corporation Limited v.	299
Halifax, Francis v.	145
Halifax, M & H Realty Company Limited v.	255
Halifax County, Ninos et al v.	97
Halifax County, Shatford et al (Ocean Farmers) v.	161
Hughes et al (Residents of Mountain Road) v. New Glasgow	117
Junkin v. Bridgewater	79
Kings County, Sanford v.	69
Kings County, Scotney v.	385
M & H Realty Company Limited v. Halifax	255
Nash v. Chester	405
New Glasgow, Hughes et al (Residents of Mountain Road) v.	117
Ninos et al v. Halifax County	97

Pictou, Calvi v. 277

Pioneer Ready Mix Limited v. Cape Breton County 355

Sanford v. Kings County 69

Scotney v. Kings County 385

Shatford et al (Ocean Farmers) v. Halifax County 161

PLANNING

STATUTE TABLE

ENVIRONMENTAL PROTECTION ACT, S.N.S. 1973, c.6

s.23; 28
Shatford et al (Ocean Farmers) v Halifax County 161

MUNICIPAL BOARD ACT, S.N.S. 1981, c.9

s.25; 27(1)(2)(3)(4)
A.T.C. Properties Ltd. v Halifax 205

s.27(3)
M & H Realty Company Ltd. v Halifax 255

PLANNING ACT, S.N.S. 1969, c.16

s.47(2)
M & H Realty Company Ltd. v Halifax 255

s.47(5)
Calvi v Pictou 277

PLANNING ACT, S.N.S. 1983, c.9

s.3(e)
M & H Realty Company Ltd. v Halifax 255

s.4(3);5(1);7(1);8
Shatford et al (Ocean Farmers) v Halifax County 161

s.33(3)
Junkin v Bridgewater 79

s.38(2);33(2)(b);34
Charbonneau et al v Halifax County 321

s.45;51(2);55
Charbonneau et al v Halifax County 321

s.55;56
Scotney v Kings County 385

s.63(1)(3)(4)(5)
  Calvi v Pictou 277
  Draper et al v Antigonish 55
  Fidelity Financial Corporation Ltd v Halifax County..... 299
  Francis v Halifax 145
  Junkin v Bridgewater 79
  Nash v Chester 405
  Ninos et al v Halifax County 97

s.63(1)(3)(4)(5)(6)(7)
  Hughes et al v New Glasgow............................... 117
  Pioneer Ready Mix Ltd. v Sydney.......................... 355

s.72(1)(4)
  A.T.C. Properties Ltd. v Halifax 205
  Charbonneau et al v Halifax County 321

s.72(1)(2)(4)
  Charbonneau et al v Halifax County 321

s.76(1)(3);78(3)
  M & H Realty Company Ltd. v Halifax 255

s.78(2)(3)
  Sanford v Kings County 69
  Scotney v Kings County 385

s.83(1);85;86;87
  M & H Realty Company Ltd. v Halifax 255

s.86(1)(a);87
  Francis v Halifax 145

s.113
  Draper et al v Antigonish 55

PLANNING

SUBJECT TABLE

Contract Zoning - refusal to approve development agreement for mixed residential/commercial development - right to participate - whether refusal reasonably consistent with MPS.
A.T.C. Properties Ltd. v. Halifax 205

Contract Zoning - refusal to enter into development agreement to permit salvage yard - whether consistent with the intent of the MPS.
Charbonneau et al v. Halifax County 321

Municipal Development Permit - refusal to allow warehouse, office and wholesale sales outlet - non-conforming use - change in use.
M & H Realty Company Ltd. v. Halifax 255

Municipal Development Permit - refusal - one lot or two
Sanford v. Kings County 69

Municipal Development Permit - construction of house - 25 acre parcel with one existing dwelling zoned agricultural (A-1) - whether inconsistent with Land-use By-law - more than one dwelling per lot - Class 3 agricultural soil.
Scotney v. Kings County 385

Regional Development Permit - permit granted for fish plant - whether conforms to the Regional Development Plan - matters to be considered.
Shatford et al. v. Halifax County 161

Zoning - amendment - R-1 to R-3 - proposed 10-unit condominium - reasonably carry out the intent of the MPS.
Draper et al v. Antigonish................................ 55

Zoning - amendment - rural residential and agricultural (R-4) to light industry (M-1) - whether reasonably carries out intent of MPS.
Calvi v. Pictou 277

Zoning - amendment - refusal to rezone 11.7 acres from P-2 to R-1 - whether reasonably carries out intent of the MPS.
Fidelity Financial Corporation Ltd. v. Halifax County 299

Zoning - amendment - refusal to rezone from R-2 to R-3 - previously zoned R-3 and down-zoned to R-2 - 8 unit apartment now non-conforming use - carry out intent of the MPS - undue hardship.
Francis v. Halifax 145

Zoning - amendment - R-2 to R-1 to permit use as home for battered women - best interests of the municipality - three main concerns in evaluating.
Hughes et al v. New Glasgow.................................... 117

Zoning - amendment - R-1 to R-2 to permit two residential units and home office - reasonably carries out intent of the MPS.
Junkin v. Bridgewater 79

Zoning - amendment - refusal to rezone from R-1 to SCC - refusal to add to permitted uses in SCC zone tourist cottages associated with Inns - whether Notice of Appeal invalid - allegation of bias - whether reasonably carries out intent of MPS.
Nash v. Chester 405

Zoning - amendment - R-1 to R-4--15 unit, 2 storey building for senior citizens - whether reasonably carries out intent of the MPS.
Ninos et al v. Halifax County 97

Zoning - amendment - refusal to rezone from C-6 to M-2 to permit concrete plant - whether inconsistent with or unnecessary for the protection of the best interests of the municipality - whether undue hardship or extraordinary and compelling circumstances.
Pioneer Ready Mix Ltd. v. Cape Breton County 355

SHOPPING CENTRE

CASE TABLE

An application by Wilson's Shopping Centre Limited requesting the Board to state a case in writing for the opinion of the Appeal Division of the Supreme Court of Nova Scotia......... 425

STATUTE TABLE

Municipal Board Act, S.N.S. 1981, c.9

s.37(1)

Wilson's Shopping Centre Ltd. 425

Shopping Centre Development Act, S.N.S. 1978, 1979 c.74

Ss 2(c), (e), 3(1), 5(1), 10(1), 11(1), 12(1)

Wilson's Shopping Centre Ltd. 425

SUBJECT TABLE

Shopping Centre Development - whether permit required - whether a case should be stated to the appeal division - definition of shopping centre - definition of development.
Wilson's Shopping Centre Ltd. 425

Re Town of Bridgewater Annexation

MUNICIPAL BOUNDARIES--APPLICATION BY TOWN TO ANNEX 14.78 ACRES IN COUNTY--FACTORS TO CONSIDER--WHETHER ANNEXATION NEED BE BOTH NECESSARY AND EXPEDIENT--WHETHER ANNEXATION WAS EXPEDIENT--MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, Ss. 8, 31(1)--TOWN OF BRIDGEWATER MUNICIPAL PLANNING STRATEGY, Policies 9.2, 9.3, 9.4, 9.5

This is an application by the Council of the Town of Bridgewater to revise the boundary of the Town to include an area of 14.78 acres near the William Hebb Road (Pine Street) in the District of Conquerall Bank in the Municipality of the District of Lunenburg. The subject lands are in two parcels. One parcel consists of a large block including 6.55 ac. of undeveloped lands of Pinecrest Development Ltd., Lot 211 and portions of Lots 210, 213, and 238 owned by Pinecrest, 4.4 ac. owned by the Town of Bridgewater and other individually owned lots. The other parcel is a very small triangular parcel of 1.63 sq. ft. on the N.W. corner of Desbrisary Drive and South Avenue, part of Lot 206. The lands in question lie approximately 3300 ft. inland from the LaHave River, south of the Town. The southern and eastern boundaries are the William Hebb Road, the northern boundary is a portion of the southern boundary of the Town and the lands of John A. Hebb and Pinecrest Development abut the western boundary.

HELD--The application to annex the lands in questions to the Town is approved.

In any application for annexation the Board must consider the factors set out in s. 8 of the Municipal Boundaries and Representation Act. These are "the necessity or expediency of the order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and ... all other relevant matters that in the opinion of the Board appear to be necessary or expedient". There was evidence of ample undeveloped areas within the Town for residential development, but the Board heard evidence about only a handful of serviced lots currently available. It is true that the proposed annexation is an accommodation to one particular developer for a very small area of its subdivision, but the subdivision is one of the best and most important residential developments in the Town undertaken by a private developer, and its Phase 5 is not, according to the uncontradicted evidence of the development company's president, economically viable without annexation. Annexation would allow approval of the lots that straddle the Town-Municipality boundary. The Board disagrees that the proposed annexation is in conflict with the Town's MPS. Policy 9.3 clearly implies that residential development in the South End where the subject lands are located is part of an ongoing process constrained only by the availability of sewer and water service. Policy 9.2, which refers to the East Side as "the major ... area" for residential development, characterizes it as a "potential residential neighbourhood" and a "longterm" (i.e., future) development area. While the fact the Town owns a 4.4 acre Town Park in the Municipality is not sufficient reason in itself to justify annexation, it is one of a number of factors which may contribute to the expediency of annexation for the proposed area. The burden of proof is on the Town to justify the "necessity or expediency" of the annexation applied for. Both necessity and expediency need not be proven. Necessity has not been at issue, and the case forwarded by the Town depends on successful demonstration of expediency. The financial implications of the proposed annexation are conceded by both parties to be comparatively insignificant. The Municipality expressed anxiety over the possible "dangerous precedent" which approval would constitute, but the Board must consider each application individually according to its merits. It was adequately established that the Town is able to service the proposed lots. The 50 ft. road right-of-way required by the Town instead of the 66 ft. required in the Municipality would be advantageous and expedient for development. The annexation of the Town's public park in the Municipality would appear to be expedient for the Town. The majority of "residents and ratepayers in the area" support the application for annexation. The annexation, while not a necessity for the Town, is expedient for the completion of a successful residential development in the Town.

NOTE: 1. Only 2 of the 3 members of the Municipal Board hearing this application signed the decision. Vice-Chairman Lawrence did not indicate her agreement.

NOTE: 2. The Municipality of the District of Lunenburg filed a Notice of Objection with the Clerk of the Executive Council pursuant to Section 19(2) of the Municipal Boundaries and Representation Act. The Governor in Council issued an Order-in-Council on December 11, 1984 confirming the Board's decision. The Board issued a final order on December 17, 1984 approving the annexation effective December 31, 1984.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Municipal Boundaries and Representation Act, Chapter 195, R.S.N.S. 1967;

- and -

IN THE MATTER OF: An Application by the Town of Bridgewater to annex 14.78 acres near the William Hebb Road (Pine Street) within the Municipality of the District of Lunenburg.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, Vice-Chairman
D.W. WILSON, C.A., LL.B., Member

COUNSEL: KENDALL J. KENNEY, Q.C., for the Town of Bridgewater;

G.F. PHILIP ROMNEY, LL.B., for the Municipality of the District of Lunenburg.

DECISION

Pursuant to Section 31(1) of the Municipal Boundaries and Representation Act, Ch. 195, R.S.N.S., 1967, the Board held a hearing at the Wandlyn Inn in Bridgewater on March 13, 1984, on an application by the Council of the Town of Bridgewater (Exhibit B-1) dated December 6, 1983, and received by the Board December 12, 1983, to revise the boundary of the Town to include an area of 14.78 acres near the William Hebb Road (Pine Street) in the District of Conquerall Bank in the Municipality of the District of

At the request of the Board, the Town submitted a revised plan of survey of the area proposed for annexation (Exhibit B-3), a revised legal description of this area (Exhibit B-4) and a list of owners of lands within the area proposed for annexation including lot numbers, areas and assessments for each (Exhibit B-5). Exhibits B-3, B-4 and B-5 were received by the Board January 16, 1984. Included in the Town's application is a certified copy of a resolution of the Council of the Town of Bridgewater dated November 14, 1983, authorizing the annexation application to the Board.

Counsel for the Town filed an Affidavit of Service (Exhibit B-2) that the hearing had been advertised on February 22nd, 29th and March 7th, 1984, in the Bridgewater Bulletin and that the parties had been served with a Notice of Hearing as directed by the Board. The parties agreed that the application was properly before the Board and the Board proceeded to hear the annexation application on its merits.

The application (Exhibit B-1) contains the following grounds:

> "a) The lands form a part of the Pinecrest subdivision which is largely in the Town and the lands described in Schedule "A" form a part of that subdivision;
>
> b) The owner desires to sell lots which are partly within and partly without the Town and has requested the Town Council to make this application;
>
> c) The services for these lots can be serviced with sewer and water by the Town and the proposed streets are an extension of the Town streets;

d) The Town and its Public Service Commission already service all of the houses at present in this area;

e) The subdivider proposed to install services as an extension of existing Town water, sewer and street services in accordance with the Town's Subdivision By-law, this being the most economical way of providing services;

f) The Town owns much of the land described in Schedule "A" and uses it as a public park land;

g) It appears that the change of boundary as applied for will not create any problems relating to the finance, taxation or the education of the children of residents in the area, for the Town or the Municipality within which lie the lands described in Schedule "A"; and,

h) The owners of lands within the area to be annexed by the Town are listed in Schedule "D"."

The 14.78 acres of land which are the subject of this annexation application are in two parcels. One parcel consists of a large block including undeveloped lands of Pinecrest Development Limited (6.55 acres); Lot 211 and portions of Lots 210, 213 and 238, lands owned by Pinecrest Development Limited; lands of the Town of Bridgewater (4.4 acres) and eight other lots belonging to various persons. In addition to this large parcel, there is a very small triangular parcel of 1.63 square feet on the northwest corner of the intersection of Desbrisary Drive and Smith Avenue, part of Lot 206, lands of Joseph and Peggy Ko.

Exhibit B-5, filed by the Town as (revised) Schedule "D" of its application entitled "List of Owners of lands within the Boundaries of lands described in Schedule 'A'", provides the following information:

"Lot No.	Owner	Area	Amount of Assessment
212	Harley G. Broughm & Patricia Broughm	21,827 sq. ft.	$ 1,500.
209	Harley G. Broughm & Patricia Broughm		No assessment
	Town of Bridgewater	4.4 acres	Nil
210 & 211	Pinecrest Development Limited	25,931 sq. ft.	60,000.
216 & 235	John David Pottie & Janet Mae Pottie	43,380 sq. ft.	67,000.
217 & 236	Arthur B. Merry	29,807 sq. ft.	60,000.
218 & 237	Terrance Plunkett & Joan E. Plunkett	13,087 sq. ft.	Nil
206	Joseph and Peggy Ko	1.63 sq. ft.	Nil
213 & 238	Pinecrest Subdivision	9,312 sq. ft.	4,500."
	Pinecrest Development, undeveloped land within proposed Town boundary change	6.55 acres	

The lands which are the subject of this annexation application lie adjacent to the southern boundary of the Town of Bridgewater, approximately 3300 feet inland to the west of the LaHave River. The southern and eastern boundary of these lands is Pine Street, also known as the William Hebb Road, a gravelled road which begins at King Street in the Town of Bridgewater on the east and runs westward towards Conquerall Mills. The northern boundary of these lands is a portion of the southern boundary of the Town. Lands of John A. Hebb and lands of Pinecrest Development Limited abut the western boundary of the land proposed for annexation. The lands proposed for annexation are shown outlined in red on a plan of survey (Exhibit B-3) signed by Erwin R. Turner, N.S.L.S. on November 7, 1983 and revised to January 10, 1984.

Counsel for the Town called 9 witnesses. Counsel for the Municipality called two.

Mr. Erwin Turner, a Licenced Land Surveyor who prepared the plan of survey (Exhibit B-3) gave evidence about the area proposed to be annexed. He pointed out that some undeveloped lands of Pinecrest Development Limited north of lands of John A. Hebb were not included in the area proposed for annexation because the area was low-lying and therefore not serviceable.

Mr. Errol Hebb, a registered land surveyor practising in Bridgewater since 1945 gave evidence about Pinecrest Subdivision which he personally had laid out and surveyed. A plan entitled "Plan of Survey showing subdivision of property of Pinecrest Development Limited in the Town of Bridgewater, Nova Scotia", prepared by Mr. Hebb, dated August 16, 1978, and revised September 24, 1979, was filed as Item No. 4 of Exhibit B-6, a collection of 17 articles submitted as evidence by the Town. This survey plan shows that the Town boundary cuts through lots 284 to 293 which front on an unnamed road running east-west and intersecting with Olympiad Avenue on the east. According to Mr. Hebb there is a 24-foot drop in elevation from the unnamed street to the south and east towards Hebb Mill Brook. Mr. Hebb stated that the developer wanted all lots to be serviced by Town sewers and that the plan shows the best use of the land in order to have services.

In cross-examination Mr. Hebb stated that Phase 5, which contains Lots 284-293 which straddle the Town boundary, was laid out by him in 1977 and 1978 and designed to be serviced entirely in the Town. He agreed that 11 out of 89 lots in this phase were outside the Town and that Phase 5 could have been developed entirely within the Town if lots had been made smaller.

Mr. Geary Romkey, Director of Assessment for Lunenburg County since January 23, 1984, confirmed the assessments shown in Schedule "D" (Exhibit B-5) and stated that the total assessment in the area proposed for annexation was $193,000.00 in 1983. There are 3 houses in the area and according to Mr. Romkey the residential tax rate in the Municipality of the County of Lunenburg in 1983 was 77 cents. The Town park in the area proposed for annexation was not assessed in 1984 which Mr. Romkey stated was an omission which would be corrected on the 1985 assessment roll.

Mr. William E. Hebb, Town Clerk-Treasurer, gave evidence that the 1983 assessment of the lands proposed for annexation represented 1/10th of 1% of the total town assessment of $190,716,055. Using figures from Item No. 12 of Exhibit B-6 Mr. Hebb stated that the total 1983 tax revenue of the town was $5,637,756.00. He projected that the 1983 revenue from the subject area if taxed at the 1983 town rate would have been $2509.00. The Town's residential tax rate in 1983 was $1.30, the second lowest in the Province according to Mr. Hebb. He stated that the Town currently provides sewer service to the three existing residences in the subject area at a cost of $150.00 per annum for each household.

Mr. Peter Oickle, Planning Director of the Lunenburg District Planning Commission, gave evidence on the consequences of the current split jurisdiction of Lots 285 - 293. Those portions of the lots in question which are within the Town are zoned residential single family R-1 and the balance of each lot lying in the municipality is unzoned. In Mr. Oickle's opinion it might be possible to build on these lots, subject to the building by-law of the Town. He acknowledged that incompatible uses could be possible on the lots straddling the Town-Municipality boundary and stated that Town Council might want to consider rezoning the unzoned balance of the lots if annexation were approved. However, Mr. Oickle felt that the annexation, if approved, would have "no effect on planning".

Under cross-examination, Mr. Oickle said that he believed the portion of lots 285 - 298 which were in the Town could be approved for subdivision providing they met the Town's minimum lot size and frontage requirements. The rear portions of these lots which are in the Municipality could be approved under the Municipality's undersized lot legislation, he believed, provided that there was right-of-way access through to the street on which the lots have frontage.

Mr. Oickle referred to the 1979 report by the Lunenburg District Planning Commission (Exhibit B-10) which considered the implications and the merits of a request by Pinecrest Development Limited dated November 15, 1978, to the Town of Bridgewater that the Town apply to the Board of Commissioners of Public Utilities "to annex that area lying in the Municipality of the District of Lunenburg owned by the following: Pinecrest Development Ltd., a planning point of view Mr. Oickle was in favour of the proposed annexation.

David McGinnis, Chief of Police for the Town of Bridgewater, testified that the annexation of the subject area would be no further burden to his police staff.

Mr. John MacIntosh, Town Engineer for the Town of Bridgewater since October, 1971, gave evidence on the current servicing situation in the vicinity of the area proposed for annexation. Mr. MacIntosh stated that the Town is currently servicing the northwest side of Pinecrest Subdivision by the installation of new watermains and a pumping station still under construction at the intersection of Jubilee Road and Desbrisay Drive. Water service is in place on Desbrisay Drive south to Smith Avenue. In his opinion, phase 5 of Pinecrest Development Limited, or any area west of Desbrisay Drive, would need water pressure boosting which will become available with the completion of the pumping station at Jubilee Road and Desbrisay.

Sewer services, both storm and sanitary, are installed on Desbrisay Drive south to and including Smith Avenue using a gravity flow system. If the area proposed for annexation remained in the Municipality but Phase 5 were developed Mr. MacIntosh stated that both sewer services would have to flow north (uphill) on Olympiad to Beechwood Street before flowing south on Desbrisay and would probably require a pumping station. On the other hand, if annexation were approved, Mr. MacIntosh felt that all of Phase 5 could be serviced by gravity sewer using Olympiad Avenue for sanitary sewer to Smith Avenue, and Olympiad Avenue south to Hebb Mill Brook for storm sewer.

the Town of Bridgewater, Arthur Merry [and] G.F. Philip Romney andIngrid A. Romney". The eventual outcome of the 1978 request by Pinecrest Development Limited, according to Mr. Oickle,was that a small area at the intersection of Desbrisay Drive and Smith Avenue was annexed to the Town by mutual consent in January, 1981. The decision of the Board of Commissioners of Public Utilities which approved this annexation, effective March 1, 1981, was filed with the Board as Exhibit B-12.

Mr. Oickle stated that he had not done any studies or reports on the current annexation but had considered its possible effects. In his opinion annexation would resolve subdivision problems which would be a benefit because it would remove "grey areas of interpretation". He felt that the Town's servicing would be positively improved because of increased land control which could remove the possibility of conflicting land uses on the rear of the affected lots 284 - 293.

In summary, Mr. Oickle stated in cross-examination that the annexation applied for was perhaps not a necessity if the legalities involved in the border subdivision lots could be worked out, but that annexation would be expedient for the clarification of the current situation. Asked by Counsel for the Municipality if annexation would be equally desirable in his opinion if there were no lots straddling the boundary, Mr. Oickle said that the desire of the Town would have to be looked at differently in that case. Mr. Oickle did not think there were large numbers of approved residential lots in the Town at that time, although he said there was sufficient residential (unserviced) land in Town for the foreseeable future. From

Mr. MacIntosh stated that the Town provided street maintenance (snow plowing and salting), garbage collection, street lights and fire protection through the Town's volunteer fire department to the Pinecrest Subdivision. The Town Park which is included in the area proposed for annexation is managed by the Town's Parks and Recreation Department which has "underbrushed" the area and plans to develop some play areas this year, according to Mr. MacIntosh.

On the subject of available serviced lots in the Town, Mr. MacIntosh believed that there were less than 5 available on the east side of Bridgewater and "a number" of other serviced lots elsewhere. He pointed out that Pinecrest Subdivision lots were larger than others available and were treed, unlike some other subdivision lots.

Under cross-examination Mr. MacIntosh stated that no extension of services was contingent on annexation, that the village of Hebbville receives both water and sewer services from the Town of Bridgewater, and that the Town's sewage treatment plant though frequently overloaded would "have to" provide service to phase 5 of Pinecrest Development Limited.

Mr. MacIntosh was questioned about the state of development of Glen Allan Subdivision, a 450 acre project of the Bridgewater Development Commission located on the east side of the Lahave River. Referring to Exhibit B-13, a conceptual plan of Glen Allan Subdivision, Mr. MacIntosh stated that a comparatively small area in the north corner comprising 85 residential lots was already developed, including a senior citizen complex. With regard to expansion, he knew of nothing definite although he believed that a consultant had been retained to design services for the northwest corner of the subdivision.

Mayor Henry Cook gave evidence on the impact and importance of Pinecrest Subdivision to the Town of Bridgewater. In his opinion, it was one of the nicest subdivisions in Town - well laid out and a good positive development for the Town. In view of the few serviced lots available and the scarcity of developers to take the financial risk of servicing land (a requirement of the Town), he supported the annexation application. He pointed out that the Town had asked for the Municipality's co-operation for the proposed boundary change which was refused.

Dr. Wylie Smith, President of Pinecrest Development Limited since it was started 20 years ago gave evidence on the history of the development and the reasons for his request to Council to annex the balance of the subdivision outside the Town boundary. Dr. Smith stated that there were no serviced lots for sale in the older part of Pinecrest Subdivision and that Phase 5 development had been held up because of water pressure problems in the area. As a developer, Dr. Smith said that he preferred to deal with one municipal government (the Town). The street layouts for Phase 5 have been in place for 6 - 7 years according to Dr. Smith and Pinecrest Development Limited could not afford to re-arrange the roads to ensure that all the proposed lots lie within the Town. He explained that the southward extension of Smith Avenue from the intersection with Desbrisay Drive into what is now the Municipality would require a 66 foot right-of-way unlike the existing 50 foot right-of-way which is the requirement of the Town. Since lots at the intersection of Smith Avenue and Desbrisay Drive are now sold, Dr. Smith was doubtful about the possibility of acquiring the extra footage needed to increase the right-of-way from 50 feet to 66 feet. Dr. Smith stated that Phase 5 was not financially viable without the "extra 9 lots on the south end", i.e., without the lots which currently straddle the Town - Municipality border.

In cross-examination Dr. Smith stated that he had not initially realized that there was a boundary cross-over in the layout of Phase 5, but had eventually been made aware of it by his surveyor before the roads were cut out (approximately 6 years ago). The 4.33 acre parcel owned by Pinecrest Development Limited which lies in the area proposed for annexation to the north of the Town park and abutting 4 of the lots which straddle the boundary, would be kept as "green area" in the company's ownership according to Dr. Smith.

Geoffery MacDonald, a development officer with the Lunenburg County District Planning Commission, responsible for subdivision approvals for the Municipality since June, 1982, and overall since January 1983, gave evidence for the Municipality. According to Mr. MacDonald, there was no plan of Phase 5 on file with the District Planning Commission and to his knowledge no application had been made for subdivision approval of Phase 5 of Pinecrest Development Limited.

Mr. MacDonald reviewed the status of Elmwood Acres Subdivision as shown on a Plan of Survey (Exhibit B-7) drawn by Errol B. Hebb and dated October 25, 1975, showing property of Family Enterprises Limited in Conquerall Bank, Lunenburg County. This proposed subdivision containing approximately 64 lots was given tentative approval in December 1975, conditional on road revisions and sewer and water services being provided by the Town. The Town declined to extend its services to this proposed subdivision which is on the south side of the William Hebb Road (Pine Street), across the road from the area proposed for annexation.

Mr. MacDonald also reviewed the status of a concept plan (Exhibit B-9) drawn by E.R. Veinotte and dated June 23, 1983, of property of Nauss Bros. Limited at Conquerall Bank. According to Mr. MacDonald the 9 lots shown on the plan were at a preliminary proposal stage and had not received any subdivision approvals.

Mr. MacDonald stated that in 1983 he had received applications for subdivision approval for 12 lots in the Town of Bridgewater and 250 in the Municipality of the District of Lunenburg.

Mr. David Steele, Chief Administrative Officer for the Municipality since April, 1974, confirmed that the information regarding the actions and decisions of the Council of the Municipality contained in Exhibit B-6 was correct. He stated that Council had been worried about the precedent which annexation might establish for other landowners on the boundary who might wish to develop their land and that Council had felt that Phase 5 could be developed without the boundary lots.

Counsel for both the Town and the Municipality filed pre-hearing briefs with the Board. A brief from the Commissioners of the Village of Hebbville was filed on their behalf at the conclusion of the hearing, expressing their opposition to the annexation because of the "dangerous and unwarranted precedent" its approval could set for possible future annexation applications affecting the boundaries of the Village. The Board received post-hearing briefs from both the Town and the Municipality.

In considering any application for annexation the Board must consider the factors set out in Section 8 of the Municipal Boundaries and Representation Act as follows:

> " Upon an application to the Board, the Board shall inquire into and take into account the necessity or expediency of the order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and into all other relevant matters that in the opinion of the Board appear to be necessary or expedient."

The conclusions stated in the pre-hearing brief for the Town are as follows:

> " Whether the proposal is expedient or necessary turns in large measure on the question of which unit can more effectively and efficiently provide local services. The vital question is not whether one municipality or the other has a greater need of the area in question, but whether the area needs one of the municipalities more than the other. In this particular situation, I submit that the area needs the annexation to the Town of Bridgewater, and that this is in the general public interest for the following reasons:
>
> 1. Water and sewer services can be most effectively supplied by the Town.
>
> 2. The Subdivision of the land in the most advantageous way can be done best through the incorporation of the area into the Town of Bridgewater so that the Bridgewater Subdivision Regulations and by-law only would apply. This would avoid a jurisdictional muddle or cloud resulting from the presence of two municipal units within one small lot or a number of small lots.
>
> 3. Since the Town now operates such special services as snow plowing, fire and police protection,

> and garbage collection in the area, it can readily provide this without further substantial expense.
>
> 4. The Town normally does provide street lighting. The Municipality has not done so at the present time in this area.
>
> 5. The Town can more effectively provide fire protection services, since its water system provides hydrants and its fire station is closest to the area. The Public Service Commission of Bridgewater, an agency of the Town, is increasing the volume and pressure of water in its area.
>
> 6. The Town has a park within the area and provides that amenity to the people of the area.
>
> 7. Police protection can reasonably be provided by the Town since its officers would be patrolling in the area and the proposed boundary change would simplify jurisdictional questions.
>
> 8. If the Town has jurisdiction over the proposed area, the street width would be 50 feet and if it were in the Municipality it would be difficult at least, to achieve the width required by the Department of Transportation.
>
> 9. The people in the area make use of general Town services such as library, museum and recreational facilities. For these reasons, it appears that the Town can more effectively and efficiently provide local services.
>
> 10. It is in the general public interest to permit feasible and orderly growth of towns, to facilitate the provision of housing, public services on an efficient basis and employment."

The conclusions drawn by counsel for the Municipality, on the other hand, are as follows:

> "a) There exists ample developed and undeveloped areas within the present Town boundaries, for residential development for years to come.
>
> b) The proposed annexation is an accommodation to one particular developer for a very small area of its subdivision.
>
> c) The proposed annexation is in conflict with the Town's recently adopted Municipal Development Plan.

> d) Ownership of land by the Town in the Municipality is not sufficient reason for annexation.
>
> e) The burden of proof is on the Town.
>
> f) Actual need must be shown before the Board orders annexation without the consent of the Municipality.
>
> g) The Town cannot show need or necessity for annexation.
>
> h) Approval of this application for annexation would set a dangerous and unwarranted precedent. The loss of assessment in this particular application is not great, however, continued applications for annexation would in total result in serious assessment loss and a resulting increase in taxation for the residents of the Municipality."

While there was evidence adduced at the hearing that there are ample undeveloped areas within the Town for residential development, particularly in the Glen Allan Subdivision on the east side of the river, the Board heard evidence about only a handful of serviced lots currently available.

Counsel for the Municipality argues that "the proposed annexation is an accommodation to one particular developer for a very small area of its subdivision" which the Board agrees is true. Pinecrest subdivision is however, one of the best and most important residential developments in the Town undertaken by a private developer, according to Mayor Cook. The layout for Phase 5 provides for the best use of the land for servicing according to the surveyor who laid it out. The uncontradicted evidence of Dr. Wylie Smith, President of Pinecrest Development Limited, was that Phase 5 was not economically viable without annexation which would allow the approval of the lots which straddle the Town-Municipality boundary.

The Board disagrees with the argument presented by Counsel for the Municipality that the proposed annexation is in conflict with the Town's Municipal Planning Strategy (MPS). The policies in the MPS deal with the Town's expectations for various residential areas within the Town: the "east side", the "south end", the "inner residential area" and the "north end". The inner residential area and the north end are characterized as "established residential neighbourhoods" in the relevant Policies 9.4 and 9.5 respectively, as follows:

> "9.4 The inner residential area shall be regarded as established residential neighbourhoods, subject to residential development on vacant lots, rehabilitation, conversion to higher density, and residential site redevelopment provided that such changes in the opinion of Town Council shall not substantially alter the established character and stability of these neighbourhoods.
>
> 9.5 The North End shall be regarded as an established residential neighbourhood by virtue of the five year Neighbourhood Improvement Program completed in 1980, and any development shall complement recent improvements in this neighbourhood."

The east side (the area containing Glen Allan Subdivision), and the south end (the location of the proposed annexation) are characterized in Policies 9.2 and 9.3 respectively as follows:

> "9.2 The East Side shall be regarded as the major longterm development area for potential residential neighbourhoods, subject to availability of trunk water and sewer services.
>
> 9.3 The South End shall be regarded as a developing residential neighbourhood whose further stages shall be subject to the availability of trunk water and sewer services."

Policy 9.3 clearly implies that residential development in the South End is part of an ongoing process constrained only by the availability of sewer and water services, whereas Policy 9.2 characterizes the East Side as a "potential residential neighbourhood" and a "longterm" (i.e., future) development area. In the opinion of the Board, an application for annexation by the Town at the request of a major residential developer to facilitate an additional phase of an established and successful subdivision in the South End is supportive of Policy 9.3 and is not at variance with Policies 9.2, 9.4 or 9.5.

The Board agrees that ownership of land by the Town in the Municipality (the 4.4 acre Town Park bordering William Hebb Road-Pine Street) is not sufficient reason for annexation. The Town acquired this area from Pinecrest Development Limited as a donation of open space as allowed by the Planning Act and it most logically would primarily serve the residents, current and future, of Pinecrest Subdivision. While not sufficient reason in itself to justify annexation, it is one of a number of factors which may contribute to the expediency of annexation for the proposed area.

The burden of proof is indeed on the Town to justify by information and argument the "necessity or expediency" of the annexation applied for. Section 8 of the Act does not require that both necessity and expediency be proven. In the opinion of the Board, necessity has not been at issue and the merits of the case forwarded by the Town depend on the successful demonstration of the expediency of the proposed annexation.

The financial implications of the proposed annexation are conceded by both parties to be comparatively insignificant. The total assessment in the Town in 1983 was $190,716,055.00, of which the residential assessment was $73,484,400.00. The total assessment in the Municipality in 1983 was $313,640,968.00, of which the residential assessment was $245,024,608.00. The 1983 assessment of the area proposed for annexation was $193,000.00. The assessment of $193,000.00 in 1983 for the subject area is a very small proportion of the Municipality's total 1983 residential assessment of $245,024,608.00.

The total tax revenue of the Town in 1983 was $5,637,756.00, to which the subject area would have contributed an additional $2,509.00 at the Town's 1983 tax rate. The total tax revenue of the Municipality in 1983 was $7,265,700.00, of which $1,486.10 was contributed by the area proposed for annexation. The Board concludes that "the financial position and obligations of the Municipalities affected" and "the burden of taxation upon the ratepayers" which the Board must consider according to Section 8 of the Act are of minor significance to both the Town and the Municipality in this application.

The Municipality expressed anxiety over the possible "dangerous precedent" which approval of the annexation would constitute. The Board however must consider each application for annexation individually according to its own merits, taking into account the factors which the Act requires it to consider.

In considering the argument both written and oral and the evidence adduced at the hearing by both parties, the Board has no difficulty concluding that necessity is not an issue in this proposed annexation. The Town did not argue in favour of its application on that ground. Indeed the only reference to necessity by the Town occurs in its post-hearing memorandum on the comparatively minor issue of the extension of Olympiad Avenue to Smith Avenue (Item 'f'), where the Town submits that the "Town has shown a need of the annexation in order to have an extension of Olympiad to Smith Avenue, to provide an alternate means of access into Phase 5 in case of emergencies."

Section 8 of the Act which sets out the factors which must be considered by the Board states that:

> "The Board shall inquire into and take into account the necessity or expediency of the order applied for" (emphasis added)."

While this wording indicates that both necessity and expediency do not need to be proven, nevertheless evidence of both factors would clearly strengthen the argument in favour of the applicant.

The grounds for the application are as follows:

> "(a) The lands form a part of the Pinecrest Subdivision which is largely in the Town and the lands described in Schedule "A" form a part of that subdivision;
>
> (b) The owner desires to sell lots which are partly within and partly without the Town and has requested the Town Council to make this application;
>
> (c) The services for these lots can be serviced with sewer and water by the Town and the proposed streets are an extension of the Town streets;
>
> (d) The Town and its Public Service Commission already service all of the houses at present in this area;

(e) The subdivider proposed to install services as an extension of existing Town water, sewer and street services in accordance with the Town's Subdivision By-law, this being the most economical way of providing services;

(f) The Town owns much of the land described in Schedule "A" and uses it as a public park land;

(g) It appears that the change of boundary as applied for will not create any problems relating to the finance, taxation or the education of the children of residents in the area, for the Town or the Municipality within which lie the lands described in Schedule "A" and,

(h) The owners of lands within the area to be annexed by the Town are listed in Schedule 'D'".

The Board agrees with the argument of Counsel for the Municipality that, excluding the purely factual grounds (a) and (h), the other grounds enumerated involve expediency only.

It was adequately established at the hearing that the Town is able to service the proposed lots which would straddle the boundary in the area requested to be annexed once the pumping station under construction is completed. The complications of subdivision and planning approvals for the lots which straddle the boundary would be removed if the annexation were approved, which as Dr. Wylie Smith, the developer, pointed out would be most expedient. The lesser road right-of-way required by the Town (50 feet instead of 66 feet in the Municipality) would be advantageous and expedient for the development of Phase 5 as well. The road alignment for Phase 5, cut out six years ago without subdivision approvals or servicing capacity approval, would be most expediently and economically developed as originally planned by the developer. The original plan of Pinecrest Development Limited requires annexation to most easily achieve approvals for all the proposed lots.

The Town's public park in the area proposed for annexation was acquired from the developer pursuant to provisions of the Planning Act even though it was outside its boundaries. Evidence at the hearing indicates that the Town is proceeding to develop this parkland for active recreational use. Annexation of this public park would appear to be expedient for the Town.

In this application, the Board must consider whether the "expediency of the order applied for", which appears to benefit Pinecrest Development Limited as much as the Town, is sufficient justification for approval of the requested annexation.

Counsel for the Town in his post-hearing supplementary memorandum addresses this issue as follows:

> "The important factor here which motivates Council is not the interest of the developer but the interest of the community as a whole, keeping in mind that the developer as a property owner is entitled to receive some co-operation from public authorities as he seeks to develop his land. Public authorities should welcome initiatives from individuals and people who wish to provide services and construct homes at their expense. This provides housing and employment."

and further he states:

> "What is necessary, I submit, is that the decision of the Board be based upon the needs of the residents and ratepayers in the area, their wishes and what agency can most appropriately provide services in this particular situation."

He concludes that:

> "....the Board should approve this application on the ground that it appears expedient for the development of the area and giving employment."

It is true that the Town submitted signed statements of consent and approval of the application for annexation by Pinecrest Development Limited, Terrance E. and Joan E. Plunkett, Harley G. Broughm, Harley and Patricia Broughm, and Arthur Brenton Merry, which represent all but one of the existing property owners in the area proposed for annexation. Uncontradicted evidence was given that John and Janet Pottie, owners of Lots 216 and 235 had not signed a consent form because of a desire to remain neutral on the issue, since Mr. Pottie is the Chief Administrative Officer of the Lunenburg County District School Board which services both the Town and the Municipality. The majority of "residents and ratepayers in the area", then, support the application for annexation.

The other basis for the Board's decision, according to Counsel for the Town, should be "what agency can most appropriately provide services in this particular situation." Evidence was led that the Town now provides sewer and water and street maintenance to the portion of the area proposed for annexation which is already developed. The issue then is whether the Town can or should provide services for the 11 proposed lots which would straddle the boundary. Evidence adduced at the hearing was uncertain about the feasibility of those lots being developed if annexation was not approved. It may be possible however, if those lots which straddle the boundary are capable of subdivision approval and eligible for building permits, that the Town would be able to provide the usual municipal services.

If, however, the Board were to refuse approval for annexation and the developer then decided, as he stated in evidence he would, that Phase 5 as originally laid out was not viable, the issue of provision of services for the proposed lots which straddle the boundary ceases to exist.

The question of alteration of municipal boundaries, even for the comparatively small area in this application, is an issue which affects the interests not only of the property owners of the area involved, but of the citizens present and future of their respective municipal units. Because a degree of certainty about territorial jurisdiction is preferable for all municipal operations, the Board considers that annexation applications should not be lightly undertaken.

From the evidence adduced and upon consideration of the issues and after examination of the area involved, the Board considers that the principle beneficiaries of this annexation, if approved, would be both the Town of Bridgewater as Applicant and the developer at whose request the application was made. The existing residents and property owners in the area proposed for annexation are supportive of the application.

The Board concludes that annexation in this case is not a necessity for the Town but is expedient for the completion of a successful residential development in the Town and would have no significant effect on the financial obligations of either municipality or the burden of taxation upon their ratepayers.

The Board for the reasons cited, approves the application of the Town of Bridgewater to annex 14.78 acres near the William Hebb Road (Pine Street) within the Municipality of the District of Lunenburg.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 18th day of October, A.D., 1984.

R.H. Blois

R.H. BLOIS, Chairman

Darryl W. Wilson

DARRYL W. WILSON

Re Town of Oxford and County of Cumberland

MUNICIPAL BOUNDARIES--ANNEXATION--APPLICATION BY RATEPAYERS OF AREA OF TOWN FOR ANNEXATION TO COUNTY--FACTORS TO TAKE INTO ACCOUNT--MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, Ss. 8, 18(1), (2)

This is an application by seven ratepayers of the Town of Oxford to have "all property in the Town of Oxford lying south and west of the Trans-Canada Highway" annexed to the Municipality of the County of Cumberland. The Applicants represent a majority of the ratepayers in the area proposed to be annexed. The land proposed to be annexed to the County is about 299 acres, mostly agricultural and forest resource property, and is separated from the main part of the Town by the limited-access Highway 104. The County neither opposed nor supported the application for annexation.

HELD--The application for annexation is dismissed.

Section 8 of the Municipal Boundaries and Representation Act requires the Board to take into account "the necessity or expediency of the order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and all other relevant matters...." The Board has visited the area proposed for annexation and the other extremities of the Town. The first ground for annexation put forward by the Applicants is that the Town is an urban community while the lands in question are rural in nature. The Board finds other areas of the Town are as rural as that in question and that many towns and cities in Nova Scotia contain lands within their boundaries which are rural in nature. Likewise there are primarily rural municipal units with urban communities within them, e.g., the County of Halifax with the community of Sackville. Any such anomalies in land-use do not create the necessity or expediency justifying annexation. The Applicants secondly state that Town services are not available to them in the affected area and due to the physical barrier created by the Trans-Canada Highway, will not be available in the foreseeable future. There was evidence that all households in the Town except those in the area proposed for annexation have Town water service and that 80-90% of the households are serviced by sewer. However, none of the applicants expressed anxiety that their current on-site well and septic tank systems were inadequate or unsafe, and it is highly unlikely they would ever receive central sewer and water services from the County. The third ground for annexation is that the County tax rate is lower than that of the Town owing to a lower level of services. On the evidence adduced the Board cannot evaluate whether the level of services is lower. As well, lower taxes do not justify annexation and the Board must consider the burden of taxation not only on the applicant ratepayers but all affected ratepayers. The fourth ground is that the Town does not provide any significant level of service to the affected area. Reference is made to hydrants, street lights, sidewalks, highway maintenance and police and fire services as well as water and sewer. It is not true that the Town does not provide any significant level of services. Other areas, usually the extremities, of the Town receive the same level of service as the subject area and the Board heard no evidence that any of the absent services would be provided if annexation were approved. In light of this, the comparatively low level of services does not provide the necessity or expediency for annexation. The final ground is that the Trans-Canada Highway forms a natural barrier between the Town and the County while the present boundary is artificial. If the Highway made access from the subject area to the remainder of the Town difficult or hazardous, the argument might be valid. Now the connecting road crosses the Trans-Canada Highway without stoplights or other obstructions. The interval of more than 20 years which has elapsed between the construction of the Highway and the present application diminishes the strength of the argument. The onus is on the Applicants to satisfy the Board that the conditions and circumstances enumerated in s. 8 are satisfied. The Board is satisfied that neither necessity nor expediency justify annexation, that while the financial effects on the municipalities do not appear very significant the Town is more vulnerable to a loss of revenue, and that the burden of taxation on all affected ratepayers must as well be considered.

NOTE: Three of the seven ratepayers who applied for annexation filed a Notice of Objection with the Clerk of the Executive Council pursuant to Section 19(2) of the Municipal Boundaries and Representation Act. The Governor-in-Council issued an Order-in-Council on February 5, 1985 confirming the Board's decision. The Board issued a final order on February 14, 1985.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Municipal Boundaries and Representation Act, Ch.195, R.S.N.S., 1967

- and -

IN THE MATTER OF: An Application by seven ratepayers of the Town of Oxford to annex an area of land within the Town of Oxford to the Municipality of the County of Cumberland.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, Vice-Chairman
DARRYL WILSON, C.A., LL.B., Member

COUNSEL: BRIAN S. CREIGHTON, LL.B., for the Ratepayers;

DAVID W. GRUCHY, Q.C., RAYBERN McCUNN, Q.C., and CHRISTOPHER FLERLAGE, Articled Clerk, for the Town of Oxford.

JOHN J. LeMOINE, Q.C., for the Municipality of the County of Cumberland

DECISION

The application by seven ratepayers of the Town of Oxford, (Exhibit 0-1) to have "all property in the Town of Oxford lying south and west of the Trans-Canada Highway" annexed to the Municipality of the County of Cumberland dated September 8, 1983, was received by the Board on September 12, 1983. The application by Knol Farms Limited, Hendrik Knol, Gladys Tait, Francis MacDonald, June Rector, Geneva Cloney and Marjorie Cloney was made pursuant to Section 18(2)(c) of the Municipal Boundaries and Representation Act, Ch.195, R.S.N.S. 1967. Section 18(1) and (2) of the Act states:

> "18(1) Upon an application to it, the Board may by order:
>
> (a) amalgamate a municipality with any other municipality or municipalities;
>
> (b) annex the whole or any area or areas of a municipality to another municipality or municipalities.
>
> 18(2) Application under this Section may be made by
>
> (a) the Minister;
>
> (b) the council of a municipality; or
>
> (c) at least fifty ratepayers in the municipality or area sought to be amalgamated or annexed where there are more than one hundred ratepayers in the municipality or area or by a majority of the ratepayers in a municipality or an area where the total number of ratepayers in the municipality or area does not exceed one hundred."

The Applicants represent a majority of the ratepayers in the area proposed to be annexed which is "all the lands in the Town of Oxford south and west of the Trans-Canada Highway."

The hearing of this application took place in the Royal Canadian Legion Hall in the Town of Oxford on January 24, 1984.

By order of the Board, Notice of Hearing was published in the Oxford Journal on January 4, 11 and 18, 1983. An Affidavit of Lynn M. Veinot (Exhibit 0-2) was submitted by Counsel for the Applicants stating that copies of the Petition (Application) of the Ratepayers had been forwarded to all parties as requested by the Board. All parties agreed that the application was properly before the Board and the Board assumed jurisdiction to hear the application.

The land proposed to be annexed comprises approximately 299 acres lying to the south and west of the Trans-Canada Highway (Highway 104). The major concentration of the Town's population is to the north of the Trans-Canada Highway. The road link between the area proposed to be annexed and the remainder of the Town is a continuation of Main Street which crosses over the limited-access Highway 104 and continuing in a southerly direction becomes the road to Oxford Junction. River Philip flows through a portion of the subject area, to the east of the Oxford Junction Road. The majority of the area proposed for annexation is wooded with the exception of the cleared land around the dwellings which front on the Oxford Junction Road and the 35 acres of arable land belonging to Knol Farms Limited located to the east of the Oxford Junction Road.

The "By-law to amend Chapter 2 of the By-laws and Ordinances of the Town of Oxford" (Exhibit 0-13) approved June 20, 1962, was filed as evidence of the Town's existing boundaries.

Counsel for the Town of Oxford informed the Board that the Town does not have a Municipal Planning Strategy (MPS) or Land-use By-law.

The application for annexation (Exhibit 0-1) sets out the following grounds:

> "(a) The Town of Oxford is an urban community while the affected lands are rural in nature, being composed mostly of agricultural and forest resource property;
>
> (b) Town of Oxford services are not available to ratepayers in the affected area and will not be in the forseeable future, owing to the physical barrier of the Trans-Canada Highway;

> (c) The Municipal tax rate is lower than the Town tax rate owing to the fact that the Municipality services.a largely rural community and provides a lower level of services;
>
> (d) Unlike the ratepayers in the Municipality, the ratepayers are forced to pay for school bus service even though their children do not live close to the schools;
>
> (e) The Town of Oxford does not provide any significant level of service to the affected area;
>
> (f) The Trans-Canada Highway forms a natural boundary between the Municipality of the County of Cumberland, while the present boundary is artificial."

At the commencement of the hearing, Counsel for the Ratepayers requested that the school bussing issue, Item (d), be withdrawn as a ground of appeal.

Counsel for the Applicants called three of the Ratepayers to give evidence on their application for annexation: William Knol, as President of Knol Farms Limited, Francis MacDonald and Gladys Tait.

William Knol stated that Knol Farms Limited owns 80 acres on the east side of the Oxford Junction Road, 35 of which are arable. His family has farmed in this location since 1958. In the "early 60's" the Trans-Canada Highway was built resulting in a loss of 12 - 13 acres of the Knol farm. There are three homes on the farm property. William Knol built his there in 1979 at the insistence of the Farm Loan Board, rather than on land owned elsewhere in the County by Knol Farms Limited.

Mr. Knol gave evidence that he felt that a farm should more logically be located in the County rather than in the Town, and that he did not receive services from the Town which would justify staying within its boundaries, i.e., sidewalks, street lights, hydrants and water and sewer services. The higher tax rate of the Town was a factor in his decision to apply for a boundary change since he felt that he should not have to pay town rates if he did not receive town services.

On cross-examination, Mr. Knol acknowledged that he had never formally petitioned the Town for the services which are not provided to his area. He agreed that the Town provided fire protection service and police protection by the RCMP, a situation which would not change whether the application for annexation was granted or not. The Town snowplowed the 30-foot lane to his house on request, billing him for that service.

A "Statement of Financial Impact of Annexation of Knol Farms Limited, Francis MacDonald, Hendrick Knol and Gladys Tait", (Exhibit 0-5) filed with the Board on behalf of the Applicants shows that the 1983 tax rates in the Town were $2.84 (commercial) and $2.10 (residential). In the Municipality of the County of Cumberland for the same year the tax rates were $1.95 (commercial) and $1.05 (residential).

Exhibit 0-5 shows that the 1983 taxes paid by Knol Farms Limited would have been $1,111.50 less if they had been based on the Municipality's tax rate. Taxes paid by Knol Farms Limited to the Town of Oxford totalled $2,302.50 in 1983 and would have been $1,191.00 for 1983 if its property were in the Municipality of the County of Cumberland.

If tax rates in the Town and the Municipality were the same, William Knol stated that he probably would not want annexation to the Municipality, although a farm property such as his, he felt, should more appropriately be a part of the Municipality than a part of the Town.

Mr. Francis MacDonald, an applicant for annexation who owns 180 acres of land, which is all the area proposed to be annexed on the west side of the Oxford Junction Road, originated the application for annexation. Mr. MacDonald has lived in the Town of Oxford since 1947 and built his current house in 1976. He also owns 27 acres on the west side of Main Street, to the north of the Trans-Canada Highway. Mr. MacDonald felt that he was essentially living in the country and paying town taxes without benefitting from town services such as water, sewer, streetlights and hydrants. He stated that there is a water problem in his area. Although he has a drilled well it is not satisfactory and he does not believe that his land could be developed without an adequate water supply. Mr. MacDonald acknowledged that he had never requested such services as streetlights and sewer and water services and that the chances of obtaining those services would not improve by being a part of the Municipality rather than the Town.

Exhibit 0-5 shows that the 1983 taxes paid by Francis MacDonald would have been $593.25 less if they had been based on the Municipality's tax rate. Taxes in the Town of Oxford for the MacDonald property in the area proposed to be annexed were $1,228.50 in 1983 and taxes in the Municipality would have been $635.25 in that same year.

Mrs. Gladys Tait, one of the applicants, has lived on her residential property on the east side of the Oxford Junction Road since 1938. The principle concerns which led her to support the application for annexation to the Municipality were the high taxation and lack of town services. In cross-examination Mrs. Tait acknowledged that the only difference she would experience, if her property were in the Municipality rather than the Town, would be lower property taxes.

Exhibit 0-5 shows that the 1983 taxes paid by Gladys Tait would have been $157.50 less if they had been based on the Municipality's tax rate. Taxes in the Town of Oxford for the Tait property were $315.00 for the year 1983 and taxes in the Municipality for the Tait property would have been $157.50 in that same year.

Two other witnesses were called by Counsel for the Applicants to give evidence on the development capability of the proposed annexation area and on the extent of Department of Transportation services to that area.

Mr. Terry Evans, an employee of Canada Trust engaged in real estate sales and appraisals in Cumberland County and a former resident of Oxford for 5 years, gave evidence on the development potential of various areas of the Town of Oxford and of the proposed annexation in particular. In his opinion the land south and west of the Trans-Canada Highway , because of problems with the supply of potable water in the area, was an unlikely site for residential development, especially as there are areas in other parts of the Town which have Town sewer and water available.

Mr. Evans did not think that the area proposed for annexation was a likely site for a commercial development or a shopping mall because there were areas for commercial expansion in the business district of the Town and because he felt that the Town's population was not sufficient to support a mall even in the distant future. In cross-examination, Mr. Evans agreed that both sides of the Trans-Canada Highway could be developed "highway commercial" but he felt that such development would more logically occur on the more populated side of the highway.

Mr. Douglas Fraser, an Engineer with the Department of Transportation in Cumberland County for 5 years who is responsible for servicing the area proposed for annexation, gave evidence that the Department plows, salts and does minimal maintenance ("some shoulder work and brush cutting") in the subject area. There is an agreement between the Department and the Town to cost-share the maintenance of the highways within the town boundary, he stated, but it is more convenient for the Department to do the work on that stretch of road since they are responsible for maintenance of the nearby Trans-Canada Highway ramps. The Department of Transportation does not bill the Town for the work it does on the highway in the subject area, Mr. Fraser said, although under the cost-sharing agreement the Town is responsible for maintenance of that road.

Counsel for the Municipality of the County of Cumberland expressed the Municipality's position as being neither opposed nor in support of the application for annexation. Mr. Arnold Harrison, Municipal Clerk-Treasurer since 1971, gave evidence on a projection of the financial impact of the proposed annexation on the Municipality of the County of Cumberland (Exhibit 0-6).

This estimate of projected revenue and expenditure, dated January 24, 1984, was prepared under his direction. It indicates that the proposed annexation would increase the revenues of the Municipality by $2,687.00 which would be offset by increased expenditures of $1,435.00, resulting in a net gain to the Municipality of $1,252.00. The 1983 assessments for the ratepayers in the proposed annexation area were used in these calculations, together with the Municipality's 1983 tax rate. Matters considered in the calculation of financial impact were the 1984 uniform assessment of the Municipality, the 1984 projected operating and capital grants from the Province, projected 1984 education costs and projected 1984 Joint Expenditure Board and Cumberland District Planning Commission contributions.

Evidence on the financial implications for the Town of Oxford of the proposed annexation was given by John Beeston, a Chartered Accountant with Thorne Riddell, the Town's auditors. The study of the financial implications of annexation (Exhibit 0-3) dated January 20, 1984, was prepared by Mr. Beeston with the assistance of the Town Clerk and signed by Mr. J.W. MacQuarrie, a partner with Thorne Riddell. The Town's study of the financial effects of the proposed annexation shows that it would decrease the revenues of the Town by $5,756.00 which would be offset by a decrease in education expenditures of $1,289.00 resulting in a net decrease in revenue of $4,467.00. In the Town's calculations, the 1983 tax rate and assessments were used.

Mr. Beeston stated that he found no discrepancies between his figures and those of Mr. Harrison, Clerk-Treasurer of the Municipality. Mr. Beeston said that his study of financial implications had attempted to quantify only the material costs and revenue that would differ under annexation and did not include items of less than $200.00 or grants in lieu of taxes.

Under cross-examination Mr. Beeston calculated that the $.03 increase in the Town's tax rate which would be needed to cover the decrease in revenue if annexation were allowed, as stated on Page 2 of his report (Exhibit 0-3), would amount to an increase on the average residential tax bill (assuming an average residential assessment of $23,800) of $6.92 or approximately $7.00. In his opinion the reduction in revenue to the Town of between $4,000.00 - $5,000.00 if annexation were approved was "not a significant difference in the circumstances." The Town's 1982 budget was $851,151.00.

Evidence given by Councillor Stanley Boron and Mayor Freeman Porteous of the Town of Oxford established that all residents of the Town are supplied with water except those who live in the proposed annexation area and that 80-90% of the Town's residents, other than those in the proposed annexation area, have sewer service. Both Mayor Porteous and Councillor Boron are long-standing residents of the Town. Mayor Porteous stated that the Town's population has been virtually static for more than 30 years. At the last census in 1982 there were 1470 residents in the Town.

"Other Financial Considerations" listed in the Town's statement of financial implications (Exhibit 0-3) prepared by Mr. Beeston were (1) potential loss of availability of R.C.M.P. Detachment, (2) possible changes in land use to residential or commercial and (3) financial impact of other ratepayers requesting similar annexation.

The Town contends that "the R.C.M.P. have an administrative policy of not locating in communities of less than 1500 people" and so an additional loss of population could cause a potential review of the service by the R.C.M.P. which currently has a Detachment located in the Town. Whether or not the Town might have to provide its own police force and whether that would be more expensive than the current 60% of the R.C.M.P. costs which the Town pays for their service was admitted to be unknown.

A copy of the Federal/Provincial R.C.M.P. Agreement between the Federal Government of Canada and the Province of Nova Scotia covering the period April 1, 1981 to March 31, 1991 was filed by Counsel for the Town as Exhibit 0-11. Section 7(1) and (2) of that agreement deals with population criteria for the deployment of R.C.M.P. as municipal police:

> "7(1) The Provincial Police Services shall not without the consent of the Solicitor General, be required to provide municipal police services in any municipality having a population of more than 1500.
>
> 7(2) Upon a request being received from the Attorney General for policing by Provincial Police Services of a municipality not over 1500 population, police duties will be assumed in such municipality as soon as such additional members and accommodation as are required for such duties are available."

"Provincial Police Service" is defined in this agreement as "the aggregate of resources, members and support staff of the Force R.C.M.P. in the Province employed pursuant to this agreement in the enforcement of the Criminal Code, Provincial Statutes and Municipal By-laws....".

It would seem from the wording of this section of the agreement that the Town's anxiety that it might lose the services of the R.C.M.P. because of declining population is ill-founded. The Board's interpretation of the joint agreement indicates quite the opposite.

Mr. Cecil Hills - retired Consulting Engineer, husband of a member of the Town Council and resident of the Town for three years - gave evidence on his own behalf and not as a witness for the Applicants on the issue of the development potential of the area proposed for annexation.

Mr. Hills felt that the Town of Oxford deserved an area suitable for industrial and commercial development which would be separated from residential areas, capable of being serviced and easily accessible from the Trans-Canada Highway. The existing industrial area on Main Street was not suitable for expansion, in his opinion, because of problems resulting from previous gravel extraction in the area and because it is in the flood plain of the River Philip. Mr. Hills felt that the land west of the Oxford Junction Road in the area proposed to be annexed was the best area in town for commercial and industrial uses because two-thirds of it was a comparatively high plateau and it contained no flood plain areas. He assessed other undeveloped areas within the town and concluded that none were as suitable as the area proposed for annexation. Mr. Hills agreed with the point made in the Beeston report that the Town should not lose the area south and west of the Trans-Canada Highway which could have potential for commercial and/or industrial uses and which would, if developed, improve the tax revenues of the Town.

Two residents of the Town - Mr. Calvin Thompson and Mr. Stacey MacDonald - gave evidence on their own behalf on the third issue addressed in the Beeston report: the financial impact on the Town of additional ratepayers requesting annexation.

Mr. Thompson is a farmer who lives on the Pugwash Road within the boundaries of the Town of Oxford on a 100-acre farm of which 46 acres are arable. The Thompson property has water provided by the Town but no sewer service. There are no sidewalks in that area of the Town. Mr. Thompson expressed the opinion that he could make many of the same arguments for annexation as Knol Farms, but he was concerned that all remaining residents of the Town would suffer financially if the Town's population and tax base grew smaller through annexations. Mr. Thompson opposed the current application for annexation although he also stated that this position would be reversed if he were able to have his property annexed to the Municipality.

Mr. Stacey MacDonald has lived on his 3/4-acre property on Lower Main Street for twelve years. His property has town water service but not sewer service. There are no sidewalks in that area of town and street lights "part-time", according to

Mr. MacDonald. Mr. MacDonald felt personally that he had knowingly built in town even though he knew he would pay higher property taxes and he felt that some of the applicants had done the same. Mr. MacDonald said that it was only natural for town ratepayers to "want out" in order to pay lower taxes, but that if some ratepayers were allowed to become a part of the municipality many others would want to do likewise because of the financial advantage of lower taxes.

At the Board's request Mr. Darrell Sanford, an employee of the Department of Municipal Affairs was present and gave evidence. Mr. Sanford is a Municipal Advisor to fifteen towns and seven municipalities in the province and has held that position for four years.

Mr. Sanford stated that he had reviewed the statements of the financial implications of annexation submitted by both the Town and the Municipality and his own calculations were not significantly different. Mr. Sanford felt that the net financial gain to the Municipality if annexation took place would be insignificant. On the other hand, he felt that any loss of revenue to the Town such as the approximate $4,500.00 which would occur if annexation took place was not insignificant. Mr. Sanford gave evidence that the Town of Oxford has received funding from the province each year since 1970 "to alleviate an undue burden on the taxpayers." In the previous four years the grants have been:

1980 -	$30,000.00
1981 -	$74,000.00
1982 -	$30,000.00
1983 -	$48,000.00

Mr. Sanford under cross-examination stated that four of the fifteen towns for which he was responsible received emergency funding and that a low general assessment was the principle reason that these towns needed special assistance.

The Municipal Boundaries and Representation Act requires the Board to take into account various factors in an application such as that made by the seven ratepayers of the Town of Oxford for annexation to the Municipality of the County of Cumberland. Section 8 of the Act states:

> " Upon an application to the Board, the Board shall inquire into and take into account the necessity or expediency [expediency] of the order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and into all other relevant matters that in the opinion of the Board appear to be necessary or expedient."

The Board has considered the evidence adduced at the hearing and the exhibits filed. It has reviewed the post-hearing briefs filed by Counsel for the Applicants, the Town and the Municipality. It has visited the area proposed for annexation and the other extremities of the Town of Oxford.

Weighing all the factors to be considered by the Board according to Section 8 of the Act, the Board has considered all of the grounds of the ratepayers' application for annexation the first of which is:

> "(a) The Town of Oxford is an urban community while the affected lands are rural in nature, being composed mostly of agricultural and forest resource property;"

In the opinion of the Board, within the existing boundaries of the Town of Oxford there are built-up areas both residential and commercial, and areas that are as rural as the area proposed to be annexed. Mr. Calvin Thompson, a Town resident, gave evidence that he owns and farms a property of approximately 100 acres within the Town's boundary. The large area in the northwest section of the Town (west of Lower Main Street and north of the Little River Road) is completely underdeveloped except for some housing and other structures fronting on those two roads.

The Board believes that many of the towns and cities of Nova Scotia contain lands within their boundaries which are "rural in nature". Likewise there are primarily rural municipal units which contain essentially urban communities within their boundaries, i.e., the Municipality of the County of Halifax contains the community of Sackville which has a population of approximately 20,000. If the necessity or expediency for an order of annexation was justified by anomalies of land-use within municipal boundaries alone, the map of municipal boundaries in the province would need very considerable revision.

The area for which annexation has been applied is "rural in nature". There are other similarly rural areas within the Town's boundaries. In itself, that does not create the necessity for annexation in the Board's opinion. If this situation were to be considered expedient for the residents who have applied for annexation, others in the town and in many other urban areas of the province could make the same claim.

The applicants' second ground for the application for annexation is:

> "(b) Town of Oxford services are not available to ratepayers in the affected area and will not be in the forseeable future, owing to the physical barrier of the Trans-Canada Highway;"

Evidence at the hearing indicated that town sewer and water services are unlikely to be extended to the area proposed for annexation because of the high cost of servicing a small number of households which are somewhat removed from the center of the Town's population. Both town sewer and water services are paid for to some extent from the general revenues of the Town. All households in the town except those in the area proposed for annexation have town water service. Not all households in the town have sewer service (80-90% are serviced by sewer according to Mayor Porteous).

Although two of the applicants gave evidence that there is some difficulty with the supply of potable water in the subject area, none of the applicants expressed anxiety that their current on-site well and septic tank systems were inadequate or unsafe.

The applicants may not acquire central sewer and water services from the Town "in the foreseeable future". It is highly unlikely that they would ever acquire such services from the municipality. There seems to be neither necessity nor expediency present with regard to this ground of appeal. The applicants do not claim that town sewer and water service is a necessity. If in the "foreseeable future" they wish to obtain these services, it would seem that annexation to the municipality is not an expedient means to that end.

The third ground for annexation is:

> "(c) The Municipal tax rate is lower than the Town tax rate owing to the fact that the Municipality services a largely rural community and provides a lower level of services;"

It is not in dispute that the tax rate for 1983 in the Municipality was lower than the tax rate in the Town in the same year. On the evidence adduced at the hearing, the Board cannot evaluate whether the Municipality provides "a lower level of services" than the town and if so, whether this accounts totally for the lower tax rate of the municipality.

While it is understandable that every ratepayer of the town would prefer to pay a lower amount in taxes, that in itself does not justify an annexation order, in the opinion of the Board. The "burden of taxation upon the ratepayers" which the Board must consider in coming to a decision on this application must refer to not only the applicant ratepayers but all affected ratepayers.

The fourth ground for annexation is:

> "(e) The Town of Oxford does not provide any significant level of service to the affected area;"

Various types of municipal services were listed and evaluated in the evidence adduced at the hearing on this application. The Town does not provide municipal water and sewer service to the subject area. Other services considered were hydrants, street lights, sidewalks, highway maintenance, and police and fire service.

Since municipal water service is not provided to the area proposed for annexation, hydrants cannot be installed. Neither street lights nor sidewalks are provided to this area but according to the evidence of some town residents, there are other residents within the town boundaries who similarly do not received these services.

Highway maintenance of the Oxford Junction Road in the subject area, from the evidence presented to the Board, seems to be provided primarily by the Department of Transportation whether from custom or for convenience. On occasion however, the Town does routine maintenance or salts and snowplows the Oxford Junction Road to the south of the Trans-Canada Highway.

Police service is provided by the R.C.M.P. under contract to the Town. A Detachment is located in the Town of Oxford. In the opinion of one of the applicants, William Knol, the R.C.M.P. does not patrol the Oxford Junction Road as frequently as they do the other streets of the Town.

Fire service is provided by the Town's volunteer fire department which has three pumpers and a tanker-pumper fire truck. No evidence was led to prove that fire service would be provided any more effectively if the subject area were part of the Municipality. The Town and Municipality have a mutual aid agreement and the town fire department, being closer than the nearest fire department in the municipality in the community of Collingwood, would probably continue to be called by the residents of the subject area.

In summary, the level of service supplied by the Town of Oxford to the area proposed for annexation to the municipality varies according to the type of service. No sewer, water, or fire hydrant service is provided to the area. No street lights or sidewalks are provided. Some highway maintenance is provided. Police and fire service is provided.

In the opinion of the Board, it is not true that "the Town of Oxford does not provide any significant level of service to the affected area" (emphasis added). There are other areas of the town which receive the same level of service as the subject area - usually at the extremities of the town. There are other areas of the town which receive a higher level of service. The Board heard no evidence that any of the absent services would be provided to the applicants by the municipality if annexation were approved.

Again, the Board cannot agree that the comparatively low level of municipal services received by the applicants produces the necessity or expediency for an annexation order when the same situation applies to other areas of the town and when there is no evidence that the current situation would be remedied by a change of jurisdiction.

The fifth and final ground for the application for annexation is:

> "(f) The Trans-Canada Highway forms a natural boundary between the Municipality of the County of Cumberland, while the present boundary is artificial,"

The current boundaries of the Town of Oxford date from June 20, 1962, when a By-law "to amend Chapter 2 of the By-laws and Ordinances of the Town of Oxford" (Exhibit 0-13) was approved by the Minister of Municipal Affairs. According to the evidence of William Knol, The Trans-Canada Highway was built in the "early sixties". There may or may not be a correlation between the revision to the Town's boundary by-law (originally approved June 11, 1925) and the construction of the Trans-Canada Highway.

Consideration of the current boundaries of the Town of Oxford as they appear on Exhibit O-7 would lead to the conclusion that very little of the Town's present boundary could be described as "natural", i.e., following existing topographical features, whether man-made or natural. If the Trans-Canada Highway made access from the subject area to the remainder of the Town difficult or hazardous, the argument that the highway created a "natural boundary" might be valid. The Oxford Junction Road crosses over the Trans-Canada Highway without stoplights or other obstructions. Before the existence of the Trans-Canada Highway, the route of the Oxford Junction Road would presumably have been very similar and that road would have been, then as now, the only access route for the applicants to the center of the Town of Oxford.

If the construction of the Trans-Canada Highway did create a more "natural boundary" between the Town and the Municipality, the interval of more than 20 years which has elapsed between that event and the present application to alter the existing boundary somewhat diminishes the strength of that argument.

In coming to a decision of this application, the Board must consider the evidence adduced at the hearing and arguments by Counsel for the applicants and the two municipal units affected. The Board is bound by Section 8 of the Municipal Boundaries Act to consider those factors when weighing the evidence and argument presented to it.

Annexation may take place if in the opinion of the Board, those conditions and circumstances enumerated in Section 8 are satisfied. The onus is on the applicants for annexation to satisfy the Board that such is the case:

> " Upon an application to the Board, the Board shall inquire into and take into account the necessity or expendiency [expediency] of the order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and into all other relevant matters that in the opinion of the Board appear to be necessary or expedient."

After careful consideration the Board is satisfied that neither necessity nor expediency justify this application for annexation. The circumstances and conditions of the situation do not suggest that annexation is suitable. Although the financial effects upon both municipal units affected do not appear to be very significant, the Town is more vunerable to a loss of revenue and the Municipality states that it is disinterested in the slight financial gain it would achieve if annexation were allowed. The burden of taxation on the ratepayers in the Town would be increased if the application were approved, while the burden of the taxation on the ratepayers who have applied for annexation would be reduced. While it is in the self-interest of the applicants to apply for annexation, the circumstances of all affected ratepayers must be considered.

In the result, the Board will make no order for the annexation of lands in the Town of Oxford lying south and west of the Trans-Canada Highway to the Municipality of the County of Cumberland.

DATED at HALIFAX, Nova Scotia, this 4th day of May, 1984.

R.H. BLOIS, Q.C.

ELIZABETH LAWRENCE

DARRYL W. WILSON

Re Draper et al. and Town of Antigonish

PLANNING--ZONING--AMENDMENT--R-1 TO R-3--PROPOSED 10-UNIT CONDOMINIUM--REASONABLY CARRY OUT INTENT OF MPS--PLANNING ACT, Ss. 63(1),(3),(5), 113--ANTIGONISH MPS, Ss. 3.1, Policies P-1, P-2, P-4; 7-2, Policy P-115

This is an appeal from a decision of the Town of Antigonish to rezone Lots 1 and 2 on Mariner Drive from R-1 to R-3. The three appellants all reside, and are the only residents, on Mariner Drive. They fall within the requirement of being "aggrieved persons" as set out in s. 63(1) of the Planning Act. The rezoning would permit a proposed ten-unit condominium development. There already exists in the area a funeral parlour and church. The Planning Advisory Committee of the Town recommended in favour of the rezoning.

HELD--The appeal is allowed and Council's decision reversed.

The sole issue by virtue of s. 63(3) and (5) of the Planning Act is whether Council's rezoning can reasonably be said to carry out the intent of the Municipal Planning Strategy (MPS). The proposal is not consistent with Policy P-4 (vii) dealing with density. The proposed density is not consistent with that of the other residential development on Mariner Drive or the adjacent area, which likewise is R-1 (the funeral home was a specially created exception), and is at least medium density, which the Policy suggests be located on major collector roads. Also, inserting a ten-unit condominium building on a short, dead-end street already developed with single family homes would make the existing traffic problems created by the funeral parlour worse and offend s. 3.1 of the Land Use Policies of the MPS, which restricts non-compatible uses in existing residential areas.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Statutes of Nova Scotia, 1983,

- and -

IN THE MATTER OF: An Appeal by William Draper, John MacDonell and John Chisholm from a decision of the Council of the Town of Antigonish made May 17, 1983, which rezoned lands on the southeast side of Mariner Drive from R-1 to R-3

BEFORE: ELIZABETH LAWRENCE, Vice-Chairman

COUNSEL: WILLIAM F. MEEHAN, LL.B, for the Appellants,

A.G. MacDONALD, LL.B, for the Town of Antigonish.

DECISION

This appeal was heard August 24, 1983, in the Council Chambers of the Town of Antigonish.

Notice of Appeal (Exhibit D-1) dated June 9, 1983, was filed by William Draper, John MacDonell and John Chisholm who are all residents of Mariner Drive, from a decision of the Council of the Town of Antigonish made May 17, 1983, to rezone from R-1 to R-3 land known as Lots 1 and 2 on a plan dated May 17, 1967, drawn by Harold Hartery and approved by H.J. Sullivan, P.L.S., on Mariner Drive near the corner of Church Street. This

Notice of Appeal was received by the Board June 15, 1983.

Counsel for the Appellants submitted an Affidavit dated August 23, 1983, (Exhibit D-2) proving service of the Notice of Hearing as directed by the Board.

At the time of Council's decision, the Planning Act in force was Chapter 16, Statutes of Nova Scotia, 1969, as amended. A new Planning Act - Chapter 9, Statutes of Nova Scotia, 1983, came into effect with the Lieutenant Governor's assent on June 1, 1983, prior to the filing of the Notice of Appeal.

Evidence from the Town Clerk established that the Municipal Development Plan and Zoning By-law (Exhibits A-5 and A-6) in effect at the time of Council's decision had been adopted by Council and approved by the Minister in 1978.

Section 113 of the Planning Act, Chapter 9, Statutes of Nova Scotia, 1983, states:

> "A municipal development plan and zoning by-law passed under the former Planning Act are and are deemed to be a municipal planning strategy and land-use by-law, respectively, within the meaning of this Act, to the extent to which they are consistent with this Act."

The Board accordingly will use the terms Municipal Planning Strategy (MPS) and Land-use By-law.

The sole ground for appeal, as stated in the Notice of Appeal (Exhibit D-1) was that the "decision of Council cannot reasonably be said to carry out the intent of the Municipal Development Plan of the Town of Antigonish."

Section 63(1) of the Planning Act states:

> "The amendment, revision or refusal by a council to amend or revise the land-use by-law may be appealed by:
>
> (a) an aggrieved person;
>
> (b) the applicant;
>
> (c) the Director;
>
> (d) the council of an adjoining municipality."

Counsel for the Town did not raise the issue of whether or not the Appellants were aggrieved persons. Black's Law Dictionary, 4th Edition defines an "aggrieved party" as "one whose legal right is invalidated by an act complained of or whose pecuniary interest is directly affected by a decree or judgment." Having heard the evidence the Board has no difficulty accepting that the Appellants are aggrieved persons as required by the Planning Act.

All parties agreed that the appeal was properly before the Board and the Board proceeded to hear the appeal on the merits.

The subject property, 0.1677 hectares or approximately 17,000 square feet in size, lies on the south side of Mariner Drive as that street curves to the south. Mariner Drive is a short, paved, dead-end street leading west off Church Street and ending where the ground slopes steeply down to a large area of vacant land. There are only three homes on Mariner Drive which belong to the three Appellants. Mr. Draper's property lies immediately adjacent qnd south of the subject property; the property of Doctor MacDonell is on the west side of the street, across from the subject property; and the property of Mr. Chisholm is on the west side of Mariner Drive at the end of the street, adjacent to the MacDonell property.

All three existing homes on Mariner Drive are single family dwellings built in the period 1967-69. Doctor MacDonell gave evidence that there had been eight original lots when Mariner Drive was developed. The subject property under appeal comprises two of these original lots.

The area surrounding Mariner Drive is generally zoned R-1, Residential First Density Zone with the exception of a church on Church Street, north of Mariner Drive which property is zoned Institutional Open Space (0-2). The Town's Land-use By-law (Exhibit A-6) permits the following uses in an R-1 Zone:

> "A basement apartment in a Single Family
> detached dwelling
> Day nurseries
> Duplex dwellings
> Single family detached dwellings
> Semi-detached dwellings
> Churches
> Elementary and secondary schools and parks
> and community centers subject to the
> Recreational Open Space (01) Zone standards."

The enumerated R-1 Zone permitted uses and requirements concludes with a Section entitled "Special Provision for Existing Uses" which states:

> "Notwithstanding the permitted uses included in Section 8.1 above, the two existing funeral parlors, radio station, and doctor's office described in Appendix B shall be permitted. The development requirements for a detached dwelling shall apply for any extensions or additions."

One of the "two existing funeral parlors", Curry Bros. Funeral Directors Ltd., is situated on property abutting the north and northwest sides of Mariner Drive as it runs west from Church Street. From the evidence given at the hearing, the funeral home was in operation when the homes on Mariner Drive were built, but it was not until sometime in 1971 that the funeral home purchased a lot on Mariner Drive thereby allowing funeral traffic to enter and exit from Mariner Drive to the parking lot and driveway of the funeral home.

Section 63, Sub-sections (3) and (5) of the Planning Act states:

> "(3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy."

> "(5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

Two of the three Appellants gave evidence.

Dr. John Edward MacDonell who lives across Mariner Drive from the subject property gave evidence about the existing problems on the street which he felt were valid reasons why Council should not have approved the rezoning from R-1 to R-3. Dr. MacDonell felt strongly that traffic generated by an additional ten residential units on Mariner Drive would aggravate an already intolerable traffic problem caused by the proximity of the funeral home and to a lesser extent, the church, which is adjacent to it. As well, he expressed anxiety about potential drainage problems.

Mr. William Draper, who lives immediately adjacent to the subject property, was concerned most with a potential worsening of the traffic overflow problem caused by the funeral home. He stated that it was a "mathematical impossibility to park" on Mariner Drive when there were funerals or wakes at Curry's Funeral Home.

Mr. Draper tendered as exhibits, three composite photographs taken by him from his bedroom window and from Dr. MacDonell's driveway within ten days following the public hearing on the rezoning application, showing the overflow parking on Mariner Drive caused by funerals in progress.

The sole issue to be determined is whether the decision of Council to approve the rezoning of the subject property can reasonably be said to carry out the intent of the Municipal Planning Strategy.

Section 3.1 of the Land-use Policies in the Municipal Planning Strategy entitled "Residential Policies" contains the following paragraph:

> "Existing residential areas must be recognized as a resource to be protected and maintained. Non-compatible uses should be restricted from developing within such areas and appropriate buffers should be provided against adjacent incompatible uses. The older residential sections of Town and individual homes gave the Town character which can not be duplicated. The application of programs and policies to restore and maintain and stabilize such areas are particularly important."

Policy P-1 which follows, enumerates the possible residential uses which may be permitted in the areas designated Residential on the Generalized Future Land-use Map provided that they "enhance the character and attractiveness of the residential environment". "New multiple dwellings (more than two units)" is category (vii) of the permitted residential land uses.

Policy P-2 specifies certain residential uses which are not to be pre-zoned, as follows:

> "It shall be the intention of Council that classes "vi", "vii", "viii", and "ix" from the preceeding Policy will not be prezoned, except where the use in question is already in existance. Zoning amendments for the uses will be considered on the basis of the policies described below and the criteria in Section 7.2, Policy P-115."

Policy P-4 gives the criteria for amending the Land-use By-law for new multiple dwellings:

(i) That the development will not involve a building over three stories in height or a density of greater than 25 units per net acre or in the case of townhouse developments, that the density is not greater than 20 units per net acre; or in the case of senior citizens housing, a density of not over 40 units per acre;

(ii) That the development is served by municipal sewer and water services and that it will not strain the capacities of those services or the capacities of schools and parks;

(iii) That there is adequate on site outdoor amenity space suitable in extent and development to the nature of the development;

(iv) That the parking areas required on each site are of sufficient size to satisfy the needs of the particular development and are well designed and properly related to building and landscaped areas;

(v) That where there is redevelopment or rehabilitation of land uses within an established older residential neighbourhood, they should be of a type and physical scale that do not deleteriously affect existing uses and do not require major improvements to roads, physical services, schools, open space, recreation facilities, or other social services;

(vi) That where residential uses are to be developed adjacent to existing or designated institutional, commercial, or industrial uses, consideration shall be given to building design and the provision of barriers, berms, fences, landscaping, as part of the residential development to ameliorate deleterious effects;

(vii) That the proposed density is consistent with the general area, and that medium densities are generally located on major collector roads and that densities generally decrease from higher to lower density uses away from major traffic arteries;

(viii) That the proposal is consistent with the criteria of Section 7.2, Policy P-115."

Section 7-2, Policies pertaining to the implementation of the Zoning By-law, gives criteria for amendments to the Zoning By-law in Policy P-115, as follows:

> "P-115 In considering amendments to the Zoning By-law, in addition to all other criteria as set out in various policies of this Plan, Council shall have regard to the following matters:
>
> (i) That the proposal is in conformity with the intents of this Plan and with the requirements of all other Town Bylaws and regulations;
>
> (ii) That the proposal is not premature or inappropriate by reason of:
>
> (a) the financial capability of the Town to absorb any costs relating to the development;
>
> (b) the adequacy of sewer and water services;

(c) the adequacy and proximity of school, recreation, and any other community facilities;

(d) the adequacy of road networks in, adjacent to, or leading to the development;

(e) the potential for the contamination of watercourses or the creation of erosion or sedimentation;

(f) the potential for damage to or destruction of historic buildings and sites;

(g) preventing access to community facilities and schools.

(iii) That controls are placed on the proposed development so as to reduce conflict with any other adjacent or nearby land use by reason of:

(a) Type of use;

(b) Height, bulk, and lot coverage of the proposed building;

(c) Traffic generation, access to and egress from the site, and parking;

(d) Open storage;

(e) Signs; and

(f) Any other relevant matters of planning concern.

(g) Provision for buffering, landscaping, screening and access control to reduce potential incompatibility with adjacent land uses and traffic arteries.

(iv) Suitability of the proposed site in terms of steepness of grades, soil and geological conditions, location of watercourses, marshes, swamps, or bogs, and susceptibility to flooding."

Mr. Stanley MacLellan, Clerk of the Town of Antigonish since 1980, gave evidence that he had received an application (Exhibit D-12) from J. Whalley Construction Ltd. on March 16, 1983, to rezone "Lots 1 and 2 on a plan dated May 17, 1967 drawn by Harold Hartery and approved by H.J. Sullivan, P.L.S." from R-1 to R-3 to allow the construction of condominiums. The letter of application was accompanied by plans dated March 18, 1983 (Exhibit D-13) showing floor plans, elevations and a plot plan.

Mr. Blaise Cameron, Town building inspector since 1972, gave evidence that the original drawings showed 14 condominium units. This was subsequently reduced to 10 units for which 8 parking spaces would be provided. The proposed development would be 18 feet in height overall. It would be serviced by existing water and sewer lines on Mariner Drive. Each unit would sell for $50,000.00 - $60,000.00.

Councillor J.K. MacDonald, a member of Town Council and Chairman of the Planning Advisory Committee (PAC) for 8 years gave evidence on the PAC's review of the rezoning application and his own personal opinion of the rezoning. Councillor MacDonald stated that the three-person PAC had reviewed the condominium proposal/rezoning request and a majority of the committee felt that the rezoning was consistent with the Municipal Planning Strategy (MPS) and useful to the town for the additional accommodation it would provide and the increased town tax base which would result. Two of the three members of the committee felt that the project and the rezoning necessary for it would have "no deleterious effect on the neighbourhood" and that objections from the neighbours were not valid. It was Councillor MacDonald's personal opinion that a problem exists in the neighbourhood (the funeral home traffic) for which a solution had not been found but for which a solution "must and can be found."

Councillor Eileen Cameron Henry who lives at 99 Church Street opposite Mariner Drive, was the one member of the PAC opposed to the rezoning. The houses on Church Street in the vicinity of Mariner Drive are all older homes Councillor Henry stated (her's is 75 years old) and she felt that a large modern building as proposed by the developer would be "an anachronism in the area. She was concerned as well by flooding possibilities because of the numerous springs on the hill up Mariner Drive from Church Street where the condominiums would be built.

Counsel for the Appellants in oral summary argued that Council's approval of the rezoning of the subject property offended Policy P-4 (v) and (vii).

Policy P-4 (v) states:

> " that where there is redevelopment or rehabilitation of land uses within an established older residential neighbourhood, they should be of a type and physical scale that do not deleteriously affect existing uses and do not require major improvements to roads, physical services, schools, open space, recreation facilities, or other social services."

In the opinion of the Board the proposed condominium development is neither a redevelopment nor a rehabilitation of a land use. It is rather a development of a land use "within an established older residential neighbourhood....."

Policy P-4 (vii) states:

> " That the proposed density is consistent with the general area, and that medium densities are generally located on major collector roads and that densities generally decrease from higher to lower density uses away from major traffic arteries."

The proposed density is not consistent with the other residential development on Mariner Drive, or with the zoning in the adjacent Church Street area, which is generally R-1 First Density Residential, with the exception of the Church property which is zoned O-2 Institutional Open Space. The only other land use which is not single family residential in the immediate vicinity of Mariner Drive is the funeral home. It was established prior to the MPS and by a "Special Provision for Existing Uses" in the Land-use By-law was made a permitted use rather than a non-conforming use in an R-1 Zone.

Further, Policy P-4 (vii) states:

> " Medium densities and to be generally located on major collector roads and that "densities should generally decrease from higher to lower density uses away from major traffic arteries."

A ten unit condominium apartment building in the opinion of the Board is at least medium density although the term is not defined in the Land-use By-law. Mariner Drive is neither a major collector road nor a major traffic artery. Church Street is designated a minor collector street in the Town's M.P.S.

Counsel for the Town argued that the Town did conduct a proper review of the policies of the Plan which were applicable to the proposed conclusion. He further argued that a new building would be compatible with the comparatively new street of Mariner

Drive and that the higher density zoning on Mariner Drive would not be incompatible with the mixed uses on the older Church Street. Counsel for the Town stated that the proposed development would not tax the Town's sewer and water services and that the Town believed there was a need for such housing. On the issue of traffic on Mariner Drive, or more specifically parking, he argued that lots 1 and 2 if developed with single family houses would generate 4 cars while the 10 condominium units would allow parking for 12 cars.

Having considered the arguments of Counsel and the evidence of the witnesses, and having viewed the site and surrounding area, the Board on balance believes the appeal should be allowed. A ten-unit condominium building inserted into on a short, dead-end street already developed with single family homes, would in the Board's opinion make the existing traffic problems originating from the adjacent funeral home considerably worse, and would offend those policies of the MPS intended to restrict non-compatible uses in existing residential areas. Pursuant to Section 63(4)(b) of the Planning Act, the Board therefore reverses the decision of the Council of the Town of Antigonish which rezoned lots 1 and 2 on Mariner Drive from R-1 to R-3.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 11th day of January, A.D., 1984.

E A Lawrence

ELIZABETH LAWRENCE.

Re Sanford and County of Kings

PLANNING--MUNICIPAL DEVELOPMENT PERMIT REFUSAL--ONE LOT OR TWO--PLANNING ACT, S. 78--KING'S COUNTY MPS POLICIES 3.9, 5.3.11

This is an appeal from a decision of the Development Officer of the County of Kings refusing an application for a Municipal Development Permit for the construction of a single family dwelling. The permit was refused because the Development Officer believed the lot in question, Lot "D", had ceased to exist when final subdivision approval was given by the Municipality in March, 1977.

HELD--The appeal is dismissed and the decision of the Development Officer is confirmed.

While on July 19, 1976 Lot "D" was surveyed separately from Lot "C", subdivision approval was never sought for Lot "D" separately from Lot "C". Lots "A" and "B" were each approved, and the original Lots "C" and "D" were the residue. This residue is Class 2 or 3 agricultural soil and cannot now be subdivided for residential use without violating Policy 5.3.11 of the King's County MPS, which prohibits non-agricultural development on such soils. Under s. 78(2)(b) the Board cannot order that a permit be granted if it would be "inconsistent with the Land-Use By-Law". There already exists one dwelling on Lot "C" and so no additional dwelling could be permitted without violating the Municipality's Land-Use By-Law.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, Statutes of Nova Scotia, 1983;

- and -

IN THE MATTER OF: An Appeal by RANDY SANFORD from a decision of the Development Officer of the Municipality of the County of Kings made August 22, 1983 which refused an application by Eric D. Fraser, c/o Randy Sanford, for a municipal development permit to construct a single family dwelling on Lot "D" of the Lands of Peter Hartenhof, approximately one mile west of Berwick on the south side of Highway No. 1.

BEFORE: ELIZABETH LAWRENCE - Vice-Chairman

COUNSEL: RANDY SANFORD appeared without counsel.

PETER A. McINROY, LL.B., for the Municipality of the County of Kings.

DECISION

The hearing of this appeal took place December 5, 1983, in the Council Chambers of the Municipality of the County of Kings in Kentville, Nova Scotia.

The Appellant, Randy Sanford, appealed by letter (Exhibit S-1) received by the Board September 9, 1983, the decision of the Development Officer of the Municipality of the County of Kings, made August 22, 1983, which refused the application of Eric D. Fraser for a Municipal Development Permit for the construction of a single family dwelling on Lot "D" of the Lands of Peter Hartenhof located on the south side of Highway #1 about one mile west of the Town of Berwick.

This appeal is made pursuant to Section 78 of the Planning Act. The Appellant under oath testified that the Notice of Hearing had been published in the Kentville Advertiser on November 16th, 23rd and 30th and that all assessed owners of land within 500 feet of the subject site had been served with the Notice of Hearing as instructed by the Board. All parties agreed that the appeal was properly before the Board and the Board proceeded to hear the appeal on the merits.

The application for a Building/Development Permit (Exhibit S-16) was made August 15 in the name of Eric D. Fraser, the owner of the subject property. Mr. Sanford, the Appellant, states in a letter to the Board that he "looked after all approvals and talked to the municipality on this matter" because he wished to purchase the property and because Mr. Fraser's occupation as a truck driver meant he was away a great deal. The application for a Building/Development permit states that it is for a single family dwelling to be built on Lot "D" of the Hartenhof Subdivision, Plan Number 386, approved March 3, 1977 and registered as Plan Number 77026.

The letter to Mr. Fraser from Ridge Hiltz, Development Officer for the Municipality, dated August 22, 1983 (Exhibit S-17) gives the following information as the reason why the Building/Development Permit could not be issued:

> "Lot "D" on which your application states you wish to have a dwelling constructed ceased to exist on March 18, 1977, when the Municipality of the County of Kings gave final approval to a plan of subdivision bearing registration number 77026. The above-referenced subdivision plan consolidated

> Lot "C" and "D" to form Lot "C" while also approving Lot "B".
>
> Therefore, as there is presently a dwelling located on Lot "C" and Section 3.9 of the Zoning By-laws of the County of Kings states that only one dwelling may be constructed on a lot, I have no alternative but to refuse to issue a Municipal Development Permit to you."

The chronology of events which led to that refusal appears to be as follows. Exhibit S-7 is a survey plan showing a parcel of land in "Berwick West" sold by the Nova Scotia Farm Loan Board to Peter Hartenhof, drawn by Brian D. Peel, Nova Scotia Land Surveyor, dated January 17, 1974. Exhibit S-7 contains notations about 4 lots surveyed from this parcel. Lot "A" was surveyed March 19, 1974 and sold by Peter Hartenhof to Calvin Keddy shortly thereafter. At that time the Municipality did not have a subdivision by-law in effect so no approval was needed for Lot "A".

Two years later Mr. Peel surveyed the remainder of the parcel - Lot "B" was surveyed July 7, 1976, and Lots "C" and "D" were surveyed July 19, 1976.

By this time the Municipality had a subdivision by-law in effect and Mr. Hartenhof made application on July 26, 1976 for subdivision approval of one lot. This application, Exhibit S-13, shows that initially two lots were entered in the space designating the "number of Lots proposed" but this was altered and initialled "P.H." by Mr. Hartenhof to reduce the approval sought to just one Lot - Lot "B" which was to be an enlargement of Lot "A". Lot "D" which was originally entered in two areas of the application was stroked out and the alteration initialled by Mr. Hartenhof.

The Board heard no evidence about the date of approval of Lot "B" although that must have occurred between the date of the application for approval (July 26, 1976) and March 15, 1977 when a letter (Exhibit S-8) from Mr. Hartenhof's solicitor, John Cochrane, to the then Development Officer of the Municipality, Alan Merritt, refers to a plan which "showed only Lot "B" as being approved."

Two memos were filed in evidence which indicate the status of Lots "C" and "D" in March, 1977. Exhibit S-9 is a handwritten "Memo to File" from the Development Officer Mr. Merritt, dated March 15, 1977 and signed by him on the status of various lots subdivided from the lands of Mr. Hartenhof, which states:

> "Re: Peter Hartenhoft
>
> Based on advice given by Mr. Cochrane this day by telephone; plan #77026 is to be amended to read 'Lot B & C only' for our files and one other copy, amended and will be filed in the Registry by Mr. Cochrane as an amended plan of subd.
>
> Mr. Cochrane advised that I would not be violating any by-laws or Regs. by doing this in that the earlier approval of Lot B. gave tacit approval to Lot C (C & D) being the entire remaining lands or residue owned by Mr. Hartenhoff."

Exhibit S-10 is a handwritten memo from Mr. Cochrane to Mr. Merritt, dated March 3, 1977 and signed by Mr. Cochrane, which states:

> "Allan:
>
> I am attaching Hartenhof plan and Peel Survey. Note that Lot A was sold to Calvin S.C. Keddy in Summer of 1974. A plan showing just Lot A was acknowledged (not approved) by the Munic. in 1974. Then in 1976 Lot B was sold to the same Calvin Keddy (his deed not yet recorded). Now C & D jointly are being sold to one

> Eric Fraser. Hence I see this as a 2 lot subdiv, namely A & B one Lot and C & D one lot. Could you process today as Mar.15 is closing."

The result of the correspondence between Mr. Cochrane and Mr. Merritt appears to be Exhibit S-14 based on a plan of survey by Brian D. Peel, Nova Scotia Land Surveyor, certified January 17, 1974. Exhibit S-14 is identical to Exhibit S-7 except that a stamped certificate of final subdivision approval has been superimposed, the designations Lot"C" and Lot "D" appearing on Exhibit S-7 have been stroked out, the dividing boundary between the original surveyed Lots"C"and"D"has been stroked out, and Lot "C"is indicated to be the whole of what had been formerly Lots"C"and "D". The Subdivision approval stamp of the Municipality of the County of Kings, dated March 3, 1977, states in "Remarks and conditions of approval" that it is for "Lot"B"and"C"only" and was signed by Alan Merritt, Development Officer, on March 18, 1977.

On June 19, 1979, the Minister of Municipal Affairs approved the Municipal Development Plan (Municipal Planning Strategy) for the Municipality of the County of Kings. In the Municipal Planning Strategy (MPS) Policies for Agricultural Districts, Policy 5.3.11 states:

> "It shall be the policy of Council to prohibit within the Agricultural District the location of non-agricultural development on class 2 and 3 soils as identified on the C.L.I. Agricultural Soil Capability Map of Kings County unless otherwise stated in this Plan."

It is not in dispute that the lands formerly in the ownership of Peter Hartenhof - Lots"A","B"and"C"- are located in an

Agricultural District as defined in the MPS on soils classified as Class 2 or 3 agricultural soil capability. Lot"C", therefore, according to the MPS policies cannot now be subdivided for residential use.

Eric Fraser, the current owner of Lot"C"gave evidence on behalf of the Appellant Randy Sanford. Mr. Fraser stated that he believed that he owned two Lots, Lot "C" and Lot "D" and referred to the wording of his deed to substantiate this. The Warranty Deed, Exhibit S-15, dated March 10, 1977, conveying lands from Peter Hartenhof and Kathy Hartenhof to Eric D. Fraser, includes as Schedule "A" a legal description which reads as follows:

> " ALL that certain lot, piece or parcel of land situate, lying and being at Berwick West, in the County of Kings, and Province of Nova Scotia, more particularly bounded and described as follows:
>
> BEGINNING at a survey marker on the south road limit of Highway No. 1 at a point 345' westerly as measured along the said road limit from the northwest corner of lands of A.B.S. Poultry Ltd., formerly of Norman Clark;
>
> THENCE westerly along a curve being the south road limit of Highway No. 1 273' to a survey marker'
>
> THENCE N57° 51' W 154' along said south road limit to a survey marker;
>
> THENCE S 30° 25' W 501.8' along the east sideline of lands of Peter Hartenhof to a survey marker;
>
> THENCE N 85° 40' E 65.9' along the north side line of lands of Frank and John Chase to a survey marker;
>
> THENCE N 85° 13' E 438.1 feet along the north sideline of said Chase lands to a survey marker;
>
> THENCE N 25° 56' E 284.1' along the west sideline of lands of Calvin S. C. Keddy to the place of beginning.

> being and intended to be lots C and D shown on property survey: Lot to be sold by the Nova Scotia Farm Loan Board (Peter Hartenhof), said plan having been prepared by Brian D. Peel, N.S.L.S. dated June 15, 1974 and bearing his file No. 386. The Plan has been approved by the Development Officer of the Municipality of Kings under Registration No.   and has been filed in the Registry of Deeds at Kentville as No. P-   ".

Mr. Fraser assumed from the reference to Lots"C"and"D"in the legal description of the property that his land was in two lots. The legal description however traces the perimeter of former Lots "C"and"D" as though they were one lot.

Further Mr. Fraser gave evidence that Exhibit S-7, the plan surveyed by Brian Peel showing Lots"C"and"D"as surveyed July 19, 1976, represented his understanding of his property - namely that he owned two separate Lots,"C"and"D".

A letter dated May 19, 1977, from Mr. Hugh Latimer to Mr. Fraser (Exhibit S-3) was entered as evidence. Mr. Latimer was the solicitor for Mr. Fraser in the purchase of the subject property. The only reference in the letter to the subdivision approval of the land purchased is the following paragraph:

> "At the time of closing there was some problems about subdivision approval but this was looked after by the Solicitors for the Vendor and I received a letter from them, March 15th 1977 indicating that the lots were so approved and sending me a plan covering this matter."

Mr. Fraser stated that this letter with its reference to "lots" contributed to his understanding that he had purchased two lots together from Mr. Hartenhof.

Mr. Alan Merritt, Development Officer for the Municipality from 1972-75 and 1977-81 gave evidence on the history of the subdivision of the lands of Peter Hartenhof. He stated that only the owner or solicitor for the owner could request subdivision approval. He could not recall any discussions at the time of sale with Mr. Latimer, Mr. Fraser's solicitor, about the possibility of redividing Lot "C" into Lots "C" and "D".

From the evidence adduced at the hearing, the Board is satisfied that the Development Officer correctly refused to approve the application for a development permit by Mr. Fraser and/or Mr. Sanford. The Board is convinced by the evidence that Lot "D" for which a municipal building/development permit was applied became a part of approved Lot "C" on March 18, 1977. Since the Municipality's Land-use By-law permits only one dwelling on a lot (Policy 3.9) and since there is already one dwelling on Lot "C", if the Board were to allow the appeal that would contravene the Land-use By-law. Section 78(2)(b) of the Planning Act permits the Board to allow an appeal by ordering that the permit be granted "but no permit shall be granted that is inconsistent with the Land-use By-law".

While the Board is sympathetic to the misunderstanding by the owner of the land and the Appellant as to the status of Lot "D" the Board has no option but to confirm the decision of the Municipal Development Officer.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 2nd day of February, A.D., 1984.

ELIZABETH LAWRENCE

Re Junkin and Town of Bridgewater

PLANNING--ZONING--AMENDMENT--R-1 TO R-2 TO PERMIT TWO RESIDENTIAL UNITS AND HOME OFFICE--REASONABLY CARRIES OUT INTENT OF MPS--PLANNING ACT. Ss. 63(1)(b), (3), (4), (5)--BRIDGEWATER MPS, Policies 9.4, 9.6, 9.7, 9.8, 16.6

This is an appeal from a decision of the Town of Bridgewater refusing to rezone property at 42 Phoenix Street from Residential Single Family (R-1) to Residential Two Family (R-2). The Appellant is an accountant who intends to divide the dwelling into two residential units (one to occupy and one to rent) and an office for his accounting practice. The property is on a corner of Phoenix and Queen Streets (facing Phoenix) and backs on land zoned Residential Three and Four Family (R-3) on which is located a three-family residential unit. On the Phoenix Street side is land zoned R-1 on which is located a single-family dwelling. On the opposite side of Pheonix is land zoned commercially from which an ambulance service is operated and a two-family residential building on land zoned R-2. The predominant neighbourhood use is residential. The Lunenburg County District Planning Commission recommended in favour of the rezoning. Two letters were received opposing the rezoning, but no one involved in these letters gave evidence.

HELD--The appeal is allowed and the decision of Council is reversed. The subject lands should be rezoned to R-2.

Since there is a Municipal Planning Strategy (MPS) in effect, the Board by virtue of s. 63(3) and (5) must determine whether the decision of the Council reasonably carries out the intent of the MPS. The Board is not to allow the appeal unless the decision cannot reasonably be said to so carry out the intent. The subject land is designated "Inner Residential" in the MPS. Policy 9.4 contemplates that residential uses can be converted to higher densities where the change does not "substantially alter the established character and stability of the neighbourhood" and Policy 9.6 provides that a "mixture of ... densities may be permitted in all residential neighbourhoods". Policy 9.7 dealing with rezoning is met except that the property has frontage on local rather than arterial or collector streets. An exception to this is provided where no traffic hazard will result, which is the case here. All the requirements of the Land-Use By-Law are met. The Mayor gave evidence to speak as to Council's reasons for rejecting rezoning (he was not present when the decision was made but held a special meeting with Council to inform himself) but admitted that rezoning to R-2 would not bother him personally. The Board accepts the evidence of the Director of Planning and finds that Council's refusal to rezone does not reasonably carry out the intent of the MPS.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, Ch. 9;

- and -

IN THE MATTER OF: An Appeal by BROCK JUNKIN from the decision of the Council of the Town of Bridgewater refusing to rezone property known as 42 Phoenix Street in the Town of Bridgewater from R-1 Zone to R-2 Zone.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, Vice-Chairman.

COUNSEL: K.J. KENNY, Q.C., For the Town of Bridgewater;

H.W. MILNER, P. Eng. LL.B, for the Appellant.

DECISION

This is an appeal under Section 63(1)(b) of the Planning Act, S.N.S. 1983, Ch. 9, by Brock Junkin from the decision of the Council of the Town of Bridgewater made on June 13, 1983, refusing to rezone property in the Town located at 42 Phoenix Street from Residential Single Family (R-1) Zone to Residential Two Family (R-2) Zone. The hearing took place on October 12, 1983, in the Town's Council Chambers.

An Affidavit of Service sworn to by the Appellant's Solicitor states that a copy of the Notice of Hearing was served on those persons directed by the Board to be served. This

Affidavit also states that the Notice of Hearing was advertised in the Bridgewater Bulletin on September 21st, 28th and October 5, 1983.

The Appellant is an Accountant who resides at Petite Riviere in the County of Lunenburg. He purchased the subject property on June 17, 1983, taking title in his Wife's name. His intention is to convert the existing single family dwelling into two residential units, one of which he would occupy with his family and rent the other one. He also planned to have his office in the building in connection with his accounting practice.

The subject site is located at the corner formed by the south side of Queen Street and the west side of Phoenix Street. The lot measures 57' on Queen Street and 123' on Phoenix Street. The front of the single family dwelling on the site faces Phoenix Street. Adjoining the subject site on Queen Street is a parcel of land zoned Residential Three and Four Family (R-3) Zone on which is located a three-family residential unit. The land adjoining the subject site on Phoenix Street is zoned Residential Single Family (R-1) Zone on which is located a single family dwelling. Opposite the subject site on Phoenix Street is a commercially zoned parcel of land owned by a funeral company on which is located a building from which an ambulance service is operated. Adjacent to and south of the ambulance service property on the east side of Phoenix Street is a two family residential building on land zoned R-2. The predominant use in the neighbourhood of the subject site is residential.

The subject building appears to be in good physical condition and has a paved driveway leading from Phoenix Street to a single car garage attached to the dwelling. The purchase price paid for the subject property in June of 1983 was $35,000.00 as is evidenced by a recital in the deed to Elizabeth W. Junkin, Wife of the Appellant. A copy of this Deed was filed as Exhibit B-9.

The Town of Bridgewater has a Municipal Planning Strategy (formerly known as a Municipal Development Plan) and a Land-use Zoning By-law (formerly known as a Zoning By-law) in effect. Copies of these were filed as Exhibit B-2.

The Appellant's Notice of Appeal is dated June 28, 1983, and was filed with the Board on June 30, 1983. It was given Exhibit Number B-1 and sets out the following grounds of appeal, namely:

> "1. The decision of Council was inconsistent with or unnecessary for the protection of the best interests of the Town of Bridgewater.
>
> 2. The decision of Council was not consistent with good planning principles for the area.
>
> 3. The decision of Council was unreasonable and not consistent with the preponderance of evidence which weighed in favour of approval of the application.
>
> 4. The decision of Council does not carry out the intent and objectives of the Municipal Development Plan."

Since there is a Municipal Planning Strategy in effect for the Town, the Board is obliged under s.s. (3) of Section 63 of the Planning Act to "determine whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy" (M.P.S.). S.S. (5) of Section 63 of the Planning Act imposes a restriction on the Board not to "allow the appeal unless the Board determines that the decision of the Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy."

Brock Junkin, the Appellant, gave evidence on his own behalf. He carries on the practice of accounting. He appeared on behalf of his wife in whose name the title to the subject property vests. His intention is to divide the existing single family dwelling into two flats, one having its main entrance on Phoenix Street and the other having its main entrance on Queen Street. Mr. Junkin identified Exhibit B-5 as a rough floor plan sketch of the lower and upper flats. This sketch shows an 8' x 9' office located on the lower level next to the rear entrance to the flat. The total floor area for the building is 2,100 square feet.

Mr. Junkin identified that there would be very minor changes made to the exterior of the building. He did propose to make a flagstone walkway to the front of the house on Phoenix Street and there would be three outside parking spaces together with the existing space for one automobile in the garage. The parking area would be accessed from Phoenix Street.

On April 25, 1983, Mr. Junkin wrote a letter (item 2 of Exhibit B-3) to the Town Clerk advising that he had completed arrangements to acquire property at 42 Phoenix Street and advised the Clerk that "It is my hope to convert this property into two rental units. In line with this wish I would like to have the property rezoned to R-2 in order to permit this development".

On May 9, 1983, the Town Council passed a motion fixing June 13, 1983, as the date for a public hearing respecting the proposed rezoning of the Appellant's property. On June 13, 1983, a motion to rezone the Appellant's property from R-1 to R-2 was defeated.

The Appellant was issued a building permit on June 29, 1983 (item 12 of Exhibit B-3). The application for this permit dated May 27, 1983, and signed by the Appellant (item 14 of Exhibit B-3) states that he was "planning the following renovations of 42 Phoenix Street:

a) Remove two doorways;
b) Install tub in downstairs washroom;
c) Remove wall between two rooms;
d) Insulate downstairs;
e) Install new electrical service entrance;
f) Install hot water heating;
g) Replace kitchen flooring;
h) Paint exterior."

at an approximate cost of $10,000.00. The letter from the Deputy Building Inspector to Mr. Junkin dated June 29, 1983 indicates that the Building Permit issued to Mr. Junkin was "to permit alterations to this single family dwelling at 3 Queen Street". Mr. Junkin gave evidence that the subject property had two civic numbers, namely 42 Phoenix Street and 3 Queen Street. The letter indicated that if the building "were permitted to become a two family dwelling" there were other requirements to be met.

Evidence was given by Elizabeth Junkin, Wife of the Appellant, who stated she was the owner of the subject property. She identified Exhibit B-9 as a certified copy of her Deed to the property which is dated June 16, 1983, and registered on June 21, 1983. She stated that she was in agreement with the proceedings taken by her Husband to have her property rezoned to R-2.

The Appellant called Peter Oickle, the Director of Planning for the Lunenburg Planning area. He has a degree in

Environmental Planning and has had nine years of experience in planning matters. He is responsible for providing professional planning advice to the various municipal units in the Lunenburg Planning Area including the Town of Bridgewater.

He prepared a planning report respecting the Appellant's application for re-zoning. This report is dated May 3, 1983, a copy of which was filed as item No. 4 of Exhibit B-3. Mr. Oickle appeared at the Bridgewater Town Council Meeting held on May 9, 1983, when Council considered his report. He also was in attendance at the public hearing held on June 13, 1983, to consider the Appellant's application for rezoning.

The planning report prepared by Mr. Oickle states that the Council of the Town of Bridgewater by motion made on April 25, 1983, requested the Lunenburg County District Planning Commission to prepare a report with recommendations respecting the Appellant's application.

The planning report indicates that the Appellant had requested that the subject land be rezoned from Single Family (R-1) to Residential Two Family (R-2) to permit the conversion of the single family 2-storey residence to a 2-family residence by dividing the existing building horizontally with one unit on the second floor and one on the ground floor. Each unit would contain about 1070 square feet of living space. A 72 square foot room on the first floor would be used by the Appellant as an accounting office and this would be a permitted use in an R-2 Zone under Part 7 of the Town's Zoning By-law.

The Planning Report refers to Section 33(3) of the old Planning Act, S.N.S. 1969, chapter 16 which states:

> "A council shall not adopt, amend or revise a zoning by-law except for the purpose of carring [carrying] out the intent of the municipal development plan."

It is noteworthy that the present Planning Act, S.N.S. 1983, Chapter 9, was assented to on June 1, 1983, and therefore was in force and effect on the date (June 13, 1983) when the council's decision under appeal was made. At the time of the preparation of the planning report by Mr. Oickle (May 3, 1983) the Planning Act of 1969 was in force.

The issue which this Board must therefore address is whether the Council's decision made on June 13, 1983, in refusing to rezone the Appellant's land from R-1 to R-2 "reasonably carries out the intent of the Municipal Planning Strategy of the Town of Bridgewater within the meaning of Section 63(3) of the 1983 Planning Act.

Section 63(1)(b) clearly gives the Appellant, Brock Junkin, as the applicant for rezoning, the right of appeal from the refusal of the Council to amend the Town's Land Use By-law.

Mr. Oickle's report refers to all of the policies in the Municipal Development Plan (Municipal Planning Strategy under the 1983 Planning Act) which he considered relevant to the proposed rezoning of the Appellant's lands. The Town's Municipal Development Plan was passed at a meeting of the Town Council on January 12, 1981, and received approval by the Minister of Municipal Affairs on February 4, 1981.

The subject property is situate in an area shown as "Inner Residential" on the Generalized Future Land Use Map which forms part of the Town's M.P.S. Map. Policy 9.4 of the M.P.S. states that:

> "The inner residential area shall be regarded as established residential neighbourhoods, subject to residential development on vacant lots, rehabilitation, conversion to higher density, and residential site redevelopment provided Council shall not substantially alter the established character and stability of these neighbourhoods."

Policy 9.4 contemplates the conversion of existing residential buildings to higher densities where the change does not "substantially alter the established character and stability" of the neighbourhood".

Policy 9.6 of the M.P.S. is relevant. It reads as follows:

> "A mixture of residential building types and densities may be permitted in all residential neighbourhoods. In potential neighbourhoods similar residential building types and densities shall be encouraged to occur at the block or facing streetfront scale."

Policy 9.7 is also relevant in that it sets forth criteria to guide the council in approving zoning by-law amendments to permit multi-family residential development.

Policy 9.7 reads as follows:

> "Multi family residential development shall be permitted through Zoning By-law amendments provided that:
>
> a) Locations shall be on arterial or collector streets as shown on Map 3, Street Classification Map, except where in the opinion of Town Council traffic congestion or traffic hazards will result or be worsened;
>
> b) Locations may be permitted on local streets where in the opinion of Town Council such development shall not create heavy traffic volumes or otherwise disturb low density areas;
>
> c) Development density shall not exceed 25 dwelling units per net acre;
>
> d) Structures, driveways, parking lots, open

> space and landscaping onsite shall be compatible with and complement the scale, height, bulk, and character of adjacent areas;
>
> e) Adverse environmental influences such as noise, odour, dust, vibration, or flooding shall neither be created by nor imposed upon multi family developments;
>
> f) Multi family developments may include grouped and clustered site plan configurations in view of topographic, landscaping, and energy conservation considerations."

The planning report states that the proposed rezoning substantially meets the criteria of Policy 9.7 "except that the site does not have frontage on an arterial or collector street; both Queen Street and Pheonix Street are classified in the Plan as local streets. Subsection (b) of Policy 9.7, however, provides that Council may permit multi-family housing on local streets where Council determines that no traffic hazard will result. The proposed development in this case is not expected to result in a traffic hazard since the density is being increased by only one dwelling unit." The Board agrees with these comments.

Policy 9.8 is another relevant policy and it reads that:

> "Where any residential development shall require amendment to the Zoning By-law, no amendment shall be adopted by Town Council unless the application is for a specific development proposal."

Since the rezoning applied for in this instance is to permit the conversion of a specific single family dwelling to a two family dwelling the intent of Policy 9.8 is met.

Another relevant Policy is number 16.6 which reads as follows:

In considering amendments to the Zoning By-law and in considering Development Agreements, in addition to all other criteria as set out in various policies of this Plan, Town Council shall have regard to the following matters:

a) that the proposal is in conformance with the intent of this Plan and with the requirements of all other Town By-laws and regulations;

b) that the proposal is not premature or inappropriate by reason of:

  i) the financial capability of the Town to absorb any costs relating to the development;

  ii) the adequacy of sewer and water services, including fire flows and water pressure, or if services are not provided, the adequacy of physical site conditions for private onsite sewer and water systems;

  iii) precipitating or contributing to a pollution problem in the area;

  iv) the adequacy of storm drainage and the effect of drainage areas on adjacent uses;

  v) the adequacy and proximity of school, recreation and any other community facilities;

  vi) the adequacy of street networks in, adjacent to, or leading toward the development regarding congestion and traffic hazards;

  vii) the potential for the contamination of water-courses or the creation of erosion or sedimentation;

c) that where provided for in this plan, special conditions are imposed as stated in the Zoning By-law, on the proposed development to reduce conflict with any other adjacent or nearby land use by reason of:

  i) type of use;

  ii) emissions including air and water pollutants, vibration, heat and noise;

  iii) height, bulk, and lot coverage of the proposed building;

  iv) traffic generation, access to and egress from the site, and parking;

v) open storage;

vi) signs;

vii) similar matters of planning concern.

d) suitability of the proposed site in terms of steepness of grade, soil and geological conditions, location of watercourses, marshes, swamps, or bogs and proximity of highway ramps, railway rights-of-way and other nuisance factors.

e) provision for buffering, landscaping, screening, and access control to reduce potential incompatibility with adjacent land uses and traffic arteries."

The Board agrees with the following comments set forth in Mr. Oickle's planning report respecting Policy 16.6, viz:

> "Due to the character and scale of this proposed development, most of the criteria can easily be satisfied; however, it is important to consider Section (a) of Policy 16.6 which addresses the intent of the Municipal Development Plan. The various policies that have been cited, along with the Generalized Future Land Use Map, (Figure 1), express the intent of the Plan as it relates to this proposal. The proposed rezoning is substantially in keeping with the intent of the Municipal Development Plan as it is expressed in Plan Policy. Policy 16.6 also requires that applicable provisions of the Zoning By-law be satisfied."

The planning report reviews the applicable zoning by-law requirements in considerable detail. The report specifically refers to the requirements of the Land-use By-law respecting frontage on a public street (Section 2, Part 5); parking requirements (Section 25(a)), Part 5 and Special Requirements for converted buildings (Section 5 Part 7), before a development permit may be granted. It also reviews the requirements of property located in an R-2 Zone.

The report states that:

> "From the information provided by the applicant, and from an assessment of the site and building, it has been confirmed that the proposed use satisfies the applicable requirements of the Zoning By-law. Should Council grant the rezoning,

> a development permit could be issued for the use."
>
> The report then concludes as follows:
>
> "The proposed rezoning is in conformance with the intent of the Municipal Development Plan and it meets the various criteria for rezonings as expressed in plan policy. The use meets the requirements of the Zoning By-law for converted dwellings in the Residential Two Family (R-2) Zone; therefore, a Development Permit could be issued following the rezoning.
>
> RECOMMENDATION
>
> 1. It is recommended that Bridgewater Town Council amend Schedule "A" of the Zoning By-law by rezoning the property at 42 Pheonix Street, as shown on Figure 2, Excerpt from Schedule "A" Zoning Map, from Residential Single Family (R-1) to Residential Two Family (R-2)."

Evidence on behalf of the Appellant was given by Arnold Wamboldt who has resided for 19 years at No. 50 Phoenix Street which is immediately adjacent to the subject site. He indicated that the previous owner of the subject property carried on an insurance business from this property. Mr. Wamboldt stated that the proposed use of the subject property would not bother him or cause any devaluation of his property.

Evidence on behalf of the Town was given by Harry Cook who has been the Mayor for the past seven years. He was not present on October 12, 1983, when the Council refused to approve the Appellant's rezoning application. He stated that historically the area in which the subject lot is located had been a single family dwelling area.

The Mayor stated that he had called a special meeting of the Council a few weeks prior to the hearing before this Board to review the Council's reasons for rejecting the Appellant's application for rezoning. The Mayor although he was not present at the

June 13th meeting of Council when the decision under appeal was made wanted to discuss with his council its reasons for rejecting the application in order that he in turn could inform the Board of these reasons.

The Minutes of the Council Meeting held on June 13th which are filed as item No. 18 of Exhibit B-3 do not indicate reasons but do indicate that two letters of objection had been received, one from C.R. Coughlan, Q.C., and the other from a group of five persons. Copies of these letters form part of Exhibit B-3 (items 4 and 5). Mr. Coughlan's letter stated that he is the owner of property known as No. 10 Queen Street almost opposite the subject site. His letter suggested that it would be "an extremely bad precedent to grant the application" because "anyone who bought a single family home in any R-1 Zone and wished to turn it to multiple occupancy would cite this precedent and the whole principle of zoning would break down."

The other letter (item 4 of Exhibit B-3) signed by five residents of the Town stated objections based on the heavy parking on the narrow streets of the subject area. This letter stated that "the addition of apartments will aggravate an already difficult situation". The author of this letter would appear to be misinformed as the proposed rezoning was not for the purpose of permitting an apartment house. This letter also stated that the granting of the application would be a precedent used to support other applications for rezoning.

Counsel for the Appellant questioned the admissability and relevance of the Mayor's testimony insofar as he purported to speak on behalf of the Council as to Council's reasons for rejecting the application.

The Mayor did purport to be speaking on behalf of Council and not himself. When questioned by the Board on his own views and opinions the Mayor clearly stated that in his opinion the Appellant's proposed use of the subject property would not have an impact on the existing traffic in the area. Furthermore, the Mayor was of the opinion that if the subject building was not altered on the outside "I don't think it would impact the neighbourhood to any great degree" and wouldn't "change the character or disturb the neighbourhood". Finally the Mayor in response to questions from the Board stated that if the subject property were rezoned to R-2 it would not bother him.

The Board having reviewed the evidence adduced at the hearing, having visited the site and the general neighbourhood in which the site is located and having examined the Town's Municipal Planning Strategy and Land-use By-law is of the opinion that the Council's decision in refusing to rezone the subject property does not reasonably carry out the intent of the Town's Municipal Planning Strategy (formerly the Municipal Development Plan).

The Board accepts the evidence of Peter Oickle, the Director of Planning that the proposed rezoning is in conformance with the Town's Municipal Planning Strategy and the proposed development meets the requirements of the Land-use By-law for converted dwellings in the Residential Two Family (R-2) Zone.

The evidence of the Mayor supports the Board's opinion that the rezoning of the subject property will have little or no impact on the existing traffic in the subject area and will not change the character or disturb the neighbourhood.

It is noteworthy that none of the persons who signed the letter addressed to the Council objecting to the rezoning gave evidence at the hearing before this Board.

The Board in coming to its decision to allow the appeal does so after being fully satisfied that the restriction imposed on the Board under s.s. (5) of Section 63 of the Planning Act does not apply in this instance. In other words, the Board allows the appeal after having determined "that the decision of the Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy". The Board is of the opinion that in allowing the appeal the intent of the Town's Municipal Planning Strategy is being carried out. The subject property lies in the "inner residential area" delineated in the Town's Municipal Planning Strategy. Policy 9.4 of the M.P.S. quoted previously in this decision clearly authorizes the conversion to higher density in neighbourhoods in this area provided that the established character and stability of the neighbourhood is not substantially altered. The Board is satisfied that the rezoning to R-2 and the conversion of the existing dwelling complies with Policy 9.4 and reasonably carries out the intent of the Town's Municipal Planning Strategy.

The Board pursuant to s.s. 4 of Section 63 of the Planning Act S.N.S. 1983 ch. 9 allows the appeal by reversing the decision of the Council.

An Order will issue accordingly.

DATED at HALIFAX, N.S. this 12th day of March, 1984.

R H Blois

R.H. BLOIS

E M Lawrence

ELIZABETH LAWRENCE.

Re Ninos et al. and County of Halifax

PLANNING--ZONING--AMENDMENT--R-1 TO R-4--15-UNIT, 2-STOREY BUILDING FOR SENIOR CITIZENS--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--PLANNING ACT, Ss. 63(1), (3), (4), (5)--TIMBERLEA-LAKESIDE-BEECHVILLE AREA MPS Policies P-23, P-33, P-39, P-40, P-89

This is an appeal from a decision of the County of Halifax approving, on the application of the Nova Scotia Housing Commission, the rezoning of Parcel 1-AR in the Timberlea-Lakeside-Beechville area from R-1 to R-4 to permit the construction of a 15-unit, 2-storey building to provide senior citizen housing. The subject area is about one-quarter mile south of Route 3, a main Provincial Highway. Access is by way of Parkdale Ave., Maple Grove Ave. and Elm Grove Ave., which are developed with single family dwellings. The subject lands are bordered by undeveloped lands on the west and north, Elm Grove Ave. on the east and a single family dwelling belonging to the Appellant Ninos on the south. The future land-use designation is residential. Staff's Planning Report recommended against the rezoning. Neither the Nova Scotia Housing Commission nor the Municipality called any witnesses. A past Vice-Chairman of the Public Participation Committee which had recommended the existing MPS and Land-Use By-Law spoke against the rezoning.

HELD--The Appeal is allowed and Council's decision is reversed.

Since the subject site is in an area that has an MPS, the main issue is whether Council's decision cannot reasonaby be said to carry out the intent of the Municipal Planning Strategy (MPS). The Timberlea-Lakeside-Beechville MPS has no policies directed towards Senior Citizen Housing nor does the Land-Use By-Law provide a zone for such housing. Thus development involving multiple units for senior citizens is permitted only in a multi-unit dwelling (R-4) zone. Policy P-23 is clear in its intention that Council preserve the existing single-unit dwelling residential environment within areas exhibiting a residential designation shown on the Generalized Future Land-Use Map, although a housing mix and low density developments are supported by P-33 and P-23. In considering an amendment pursuant to P-33 to amend a Land-Use By-Law to permit a multiple-unit dwelling, Council must have regard to the six criteria set out and should regard them in light of their effect on reducing "the magnitude and impact potential of higher density uses on surrounding residences as well as on road and other community services". While the decision complies with the criteria relating to the availability and capacity of water and sewer services, it does not comply with criteria relating to the adequacy of access by way of collector or arterial streets, separation distances from low density residential development, the location and appearance of access and parking areas, the provision of amenity areas and the provisions of P-89 (containing additional criteria including conformity with the intent of the MPS). By not complying with five of the six criteria the proposed rezoning will not reduce the impact potential on existing residences and should not be allowed. Policies P-39 and P-40 dealing with "Housing Supplies and Programmes" are not applicable. Also Policy P-23 is not complied with as the proposed rezoning will not preserve the existing single-unit dwelling residential environment. The Appellants have discharged the onus upon them.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, Statutes of Nova Scotia 1983,

- and -

IN THE MATTER OF: An Appeal by Mr. & Mrs. Anthony Ninos, Mr. & Mrs. John V. Covey, Ms. Carole Covey, Mr. & Mrs. Gordon Hamblin, Mr. & Mrs. Murray Hemeon, Mr. & Mrs. Gordon Melanson, Mr. & Mrs. Donald Richardson, Mr. & Mrs. Kevin Siddal, Mr. & Mrs. Clifford Tonner, and Mr. & Mrs. Walter J. Yeates from the decision of the Council of the Municipality of the County of Halifax made November 3, 1983, which amended the Land-use By-law for the Timberlea-Lakeside-Beechville Area by rezoning lands of Helena Doris Poirier from R-1 Zone to R-4 Zone.

BEFORE: DARRYL W. WILSON, C.A., LL.B.

COUNSEL: ROSS STINSON, LL.B.
MEGAN E. FARQUHAR, LL.B., for the Appellants

ALLISON SCOTT, LL.B. for the Applicant, the Nova Scotia Housing Commission

ROBERT CRAGG, LL.B., for the Municipality of the County of Halifax

DECISION

The Appellants, Mr. and Mrs. Anthony Ninos, Mr. and Mrs. John V. Covey, Ms. Carole Covey, Mr. and Mrs. Gordon Hamblin, Mr. and Mrs. Murray Hemeon, Mr. and Mrs. Gordon Melanson, Mr. and Mrs. Donald Richardson, Mr. and Mrs. Kevin Siddall, Mr. and Mrs. Clifford Tonner, Mr. and Mrs. Walter J. Yeates, by Notice of Appeal signed by their solicitor, R.J. Ross Stinson, dated November 25, 1983, appealed the decision of the Council of the Municipality of the County of Halifax made on November 3, 1983, which decision approved the application of the Nova Scotia Housing Commission to amend the Land-use By-law for the Timberlea-Lakeside-Beechville area by rezoning Parcel 1-AR of the lands belonging to Helena Doris Poirier, located at Elm Grove Avenue at Timberlea, in the Municipality of the County of Halifax from R-1 Zone to R-4 Zone so as to permit the construction of a 15 unit building to provide housing for Senior Citizens. Notice of the the decision of Council amending the Land-use By-law was published on November 9, 1983 in the Halifax Herald/Mail Star.

The appeal is taken pursuant to Section 63(1) of the Planning Act which states:

> "63(1) The amendment, revision or refusal by a council to amend or revise the land-use by-law may be appealed by
>
> (a) an aggrieved person;
> (b) the applicant;
> (c) the Director;
> (d) the council of an adjoining municipality."

The Appellants' Notice of Appeal states that the grounds of appeal are that:

> "1. The Council cannot reasonably be said to be carrying out the intent of the Municipal Development Plan for Timberlea/Lakeside/Beechville in making the Amendment to Schedule "A" of the Zoning By-Law for Timberlea/Lakeside/Beechville, in that the said Amendment is inconsistent with and contrary to the intent of the Municipal Development Plan, and is therefore contrary to the Planning Act, S.N.S. 1969, c.16, and s.28 of the Municipal Board Act, S.N.S. 1981, c.9.

2. The Amendment to the Zoning By-Law is inconsistent with and contrary to the specifications set out in Policy P-33, and P-89, in the aforesaid Municipal Development Plan regarding residential zones (and therefore contravenes the Planning Act and s.28 of the Municipal Board Act).

3. The Amendment is contrary to Policy P-33 of the aforesaid Municipal Development Plan, in that the Council did not have regard to, or did not properly regard, the factors set out in Policy P-33 thereof, and the information and recommendations pertaining thereto provided by the Department of Planning & Development of the Municipality of the County of Halifax in a zoning report dated September 26, 1983. The aforesaid factors which must be considered upon making amendments to the Zoning By-Law to permit multiple-unit dwellings and which were not properly considered by the Council, are set out in Policy P-33 of the aforesaid Municipal Development Plan, and include the following:

   P-33 (iii) separation distances from low density residential development;

   (iv) the location and appearance of access and parking area;

   (v) the provision of amenity area;

   (vi) the provision of P-89;

4. The aforesaid Amendment decision is not based on any or any proper planning law principles appropriate to the Timberlea/Lakeside and Beechville area in the County of Halifax.

5. Such further and other grounds as may arise from the evidence presented at a hearing before the Nova Scotia Municipal Board."

The hearing took place in the hearing room located in the offices of the Expropriations Compensation Board, Centennial Building, 1660 Hollis Street, Suite 904, Halifax, Nova Scotia on February 7, 1984.

At the commencement of the hearing, Counsel for the Appellants filed with the Board as Exhibit N-2, an Affidavit indicating that a copy of the Notice of Hearing was served on the persons directed by the Board to be served and further that a copy of the Notice of Hearing was published in the Halifax Herald/Mail Star on January 17, 1984, January 24, and January 31, 1984.

It was agreed by all parties present that the appeal was properly before the Board and that the Board had jurisdiction to hear the appeal on its merits.

A copy of the Municipal Planning Strategy for the Timberlea-Lakeside-Beechville area and also Part 6 of the Municipality's Land-use By-law for this area which refers to the R-1 (single unit dwelling) zone for this area was filed as Exhibit N-4.

The Municipal Planning Strategy contains a section entitled "Residential Designation" and Policy P-23 of this section reads as follows:

> "Within the Residential Designation as shown on the Generalized Future Land Use Map (Map 1) it shall be the intention of Council to preserve the existing single unit dwelling residential environment with its associated institutional and open space uses."

The Municipal Planning Strategy also contains a section entitled "Multiple Unit Accommodation" and Policy P-33 in this section reads as follows:

"Multiple Unit Accommodation

Although apartment buildings are not common, new municipal water and sewer services may generate development activity. Development control mechanisms should reflect the magnitude and impact potential of higher density uses on surrounding residences as well as on road and other community services.

P-33 Notwithstanding Policy P-23, within the Residential Designation, and where municipal central sewer and water services are available, Council may consider permitting multiple unit dwellings by an amendment to the zoning by-law. In considering such amendments, Council shall have regard to the following:

(i) the availability and capacity of water and sewer services;

(ii) the adequacy of access by way of collector or arterial streets;

(iii) separation distances from low density residential development;

(iv) the location and appearance of access and parking areas;

(v) the provision of amenity areas; and

(vi) the provisions of Policy P-89."

Section P-89 of the Municipal Planning Strategy reads as follows:

"In considering amendments to the zoning by-law or development agreements, in addition to all other criteria as set out in various policies of this Plan, Council shall have appropriate regard to the following:

(i) that the proposal is in conformity with the intent of this Plan and with the requirements of all other municipal by-laws and regulations.

(ii) that the proposal is not premature or inappropriate by reason of:

(a) the financial capability of the Municipality to absorb any costs relating to the development;

(b) the adequacy of sewer and water services;

(c) the adequacy of road networks leading or adjacent to, or within the development; and

(d) the potential for damage to or for destruction of designated historic buildings and sites."

The Municipal Planning Strategy also contains a section entitled "Housing Supplies and Programs". Policies P-39 and P-40 of this section read as follows:

P-39 "It shall be the intention of Council to create a liaison between the Municipality, the Nova Scotia Housing Commission and senior levels of government in order to:

(i) develop long range residential priorities, strategies and programmes;

(ii) optimize public investment in basic infrastructure and services; and

(iii) co-ordinate planning, promotional and development efforts.

P-40 It shall be the intention of Council to participate in any federal or provincial programme leading to the upgrading and rehabilitation of the housing stock, such as the Residential Rehabilitation Programme and the Neighborhood Improvement Programme, and to encourage the use of any programmes providing assistance in the provision of adequate housing."

The Land-use By-law for the Timberlea/Lakeside/Beechville area sets forth the following permitted uses in a single unit dwelling (R-1) Zone namely:

"R-1 USES PERMITTED

No development permit shall be issued in any R-1 (Single Unit Dwelling) Zone except for the following:

Residential Uses

Single unit dwellings;
Existing mobile home parks;
Day care facilities for not more than fourteen (14) children and in conjunction with permitted dwellings;

Community Uses

Open space uses;
Institutional uses except day care facilities, medical clinics and fraternal centres and halls."

The Municipal Planning Strategy does not have any policies directed towards Senior Citizen Housing nor does the Land-use By-law provide a zone for Senior Citizen Housing. Therefore any development involving multiple units for senior citizens is permitted only in a multi-unit dwelling (R-4) zone.

The subject site is located approximately one-quarter mile south of Route 3, a main Provincial Highway. Access to the site from Route 3 is by way of Parkdale Avenue, Maple Grove Avenue and Elm Grove Avenue, which are developed with single family dwellings. Presently there are eight single family dwellings on Elm Grove Avenue. Lands immediately to the west and north of the subject site are undeveloped. Elm Grove Avenue is located to the east of the subject site and the single family dwelling belonging to Mr. Anthony Ninos is located immediately to the south of the subject site. The future land-use designation of the site is residential.

The site itself is approximately 31,195 square feet and it is the result of the amalgamation of two previously subdivided lots plus an undeveloped lot. The site is relatively flat, with evidence of impaired drainage toward the center portion. The front portion has sparse vegetation while the rear portion has a heavy tree cover.

Evidence for the Appellants was given by J. Michael Hanusiak and Anthony Ninos.

Mr. Hanusiak is employed by the Planning Department of the County of Halifax as a Planner. He was responsible for reviewing the rezoning application, obtaining comments on the application from other municipal agencies and preparing a planning report for presentation to the municipal Planning Advisory Committee for recommendation to the County Council.

The Planning Report dated September 26, 1983 recommended that Halifax Councy Council reject the application for rezoning. A copy of the Planning Report was introduced as part of Exhibit N-3. The conclusion of the report states:

> "The Department of Planning and Development has reviewed the proposed rezoning and recommends that it be rejected for the following reasons:
>
> 1. The size and shape of the proposed structure (approximately 120 feet x 66 feet x 26 feet) is inconsistent with the existing single family dwellings along Elm Grove Avenue. Thus, its presence would significantly alter the scale and streetscape of this long established, low density residential environment.
>
> 2. The lack of adequate tree cover on the front portion of the subject property, coupled with this relatively small separation distance between the proposed development, Lot 64 and Lot 67-A, will serve to lessen the privacy and enjoyment of present as well as future abutting property owners.

> 3. Given that the proposed development is to be located at the end of a series of local streets, an unnecessary amount of traffic will be generated throughout the entire residential neighbourhood. The problem of high traffic intrusion need not occur if the proposed development were located on the periphery of the subdivision and adjacent to collector and arterial roads.
>
> 4. The choice of the subject property as a location for an apartment building is poor due to its lack of proximity to shopping and business facilities, bus routes and other amenities. The locational problems of the site are compounded by the fact that no sidewalks exist in the Timberlea area.
>
> RECOMMENDATION: Based on the findings of the Department of Planning and Development, it is recommended;
>
> THAT THE REQUEST TO REZONE PARCEL 1-AR OF THE LANDS OF HELENA DORIS POIRIER, LOCATED ON ELM GROVE AVENUE AT TIMBERLEA, FROM R-1 (SINGLE UNIT DWELLING) ZONE TO R-4 (MULTI-UNIT DWELLING) ZONE BE REJECTED BY COUNTY COUNCIL."

Mr. Hanusiak said that sewer and water services being installed along Elm Grove Avenue are capable of accommodating the fifteen senior citizens units being proposed.

Mr. Hanusiak reviewed the rezoning application for compliance with the Municipal Planning Strategy. He first considered Policy P-23 since the site was in an R-1 zone. Notwithstanding Policy P-23, since the site was designated residential and services were available, Policy P-33 allowed Council to consider an amendment to the Land-use By-law permitting multiple unit dwellings provided certain conditions were met. In the opinion of Mr. Hanusiak, the proposed amendment of the Land-use By-law is not in compliance with the Municipal Planning Strategy as the following criteria found in Policy P-33 are not met:

(1) "adequacy of access by way of collector or arterial streets"

Mr. Hanusiak considers Highway No. 3 to be the collector street in the area. In Mr. Hanusiak's opinion Policy 33(ii) and Policy P-89 (ii)(c) of the Municipal Planning Strategy encourages direct access from major routes to multi-unit dwellings. The subject site which is located at the end of a series of streets in a single family dwelling neighbourhood did not meet this objective.

(2) "separation distance from low density residential development"

According to Mr. Hanusiak this is a major problem with the rezoning application. Although the proposed building will be located 30 feet from the closest single unit dwelling, 18 to 20 feet of this separation will be used as a driveway for the proposed building. The lack of vegetation on the front part of the site does not allow for any buffering effect to protect the existing dwelling to the south said Mr. Hanusiak. In his opinion future development of single family dwellings in the area will be affected by the proposed development. In Mr. Hanusiak's opinion the proposed building, which is thirteen times the size of any of the existing single family dwellings, would overwhelm the existing dwellings and disturb the integrity of the existing scale and streetscape.

(3) "the location and appearance of access and park areas"

Mr. Hanusiak said that, this criteria was not met because access to the building would affect the enjoyment of the property located immediately adjacent to the south of the site.

(4) "the provision of amenity areas"

According to Mr. Hanusiak there are no park lands or shopping facilities within close proximity to the site. In Mr. Hanusiak's opinion, the proposed site is lacking in provision of amenity areas relative to other potential sites for multi-unit dwellings within the area covered by the Municipal Planning Strategy.

Mr. Hanusiak said that the proposed development is not compatible with the existing environment which has been a subdivision for single family dwellings for twenty years. He also said that the proposed zone changes shows a dramatic increase from the lowest density form of residential zoning (R-1) to the highest density form of residential zoning (R-4).

Mr. Anthony Ninos, an Appellant, resides at 14 Elm Grove Avenue, Timberlea, Halifax County. Mr. Ninos has resided at his present location for 23 years. His property is immediately adjacent to the south of the proposed site. Mr. Ninos said there are seventy-five homes in the Pine Grove Subdivision and with the exception of a two family dwelling on one of the streets in the subdivision other than Elm Grove Avenue, all dwellings are single family units. Mr. Ninos said that the size and styling of the proposed building does not fit in with the planning of the subdivision. He also was concerned that the proposed development would increase traffic in the area which has no sidewalks and no playground area for children. He also said that the location of the driveway to the building and its two storey construction will remove his privacy and affect the enjoyment of his property. Mr. Ninos also said that there are no shopping centres in the area and the only commercial facilities are a drug store and a couple of small stores about one-quarter mile from the site. He said that bus service exists on Route 3 but does not extend into the subdivision.

Neither the Nova Scotia Housing Commission or the Municipality called any witnesses.

Mr. Conrad Marsh made a submission to the Board although he did not appear as a witness on behalf of any of the parties. Mr. Marsh is a resident of Lakeside, Halifax County. He served as Vice-Chairman of the Public Participation Committee for Beechville/Lakeside/Timberlea which was charged with the duty of recommending a Municipal Planning Strategy and Zoning By-law for the area. According to Mr. Marsh, the Municipal Planning Strategy and accompanying zoning by-law for the area are less than two years old. He said they are the result of 18 months of meetings and discussion with area residents. In his opinion, Halifax County Council has ignored the work of the Public Participation Committee, the Report and Recommendation of its Planning Department and the opinion and feelings of people who live in the affected area by approving the rezoning application. Mr. Conrad says that the rezoning will set a precedent that could harm the existing planning of the Parkdale Subdivision.

A copy of the submission of the Nova Scotia Housing Commission to Halifax County Council in support of the rezoning application was introduced as part of Exhibit N-3. This report reads in part as follows:

"1. The current land use in the area is single family residential and vacant land. The Generalized Future Land Use Map la places a "residential" designation on the area in question. This description is intended to "encourage a housing mix and other compatible uses".

2. P-33 permits multiple unit dwellings to be included in the presidential designation by amendment to the zoning by-law.

3. P-33 establishes six (6) criteria for considering applications for rezoning. With respect to the proposed rezoning:

(i) The site is fully serviced with municipal sewer and water.

(ii) The site has easy access to Route No. 3 via Elm Grove and Parkdale Avenues. The travel distance is less than one-quarter mile. The senior citizens complex by its nature will generate a minimum of additional traffic and no additional traffic during peak periods. The Transportation Map (Map #3) does not designate any collector or arterial streets in the area.

(iii) The 130-foot frontage of the site will enable the building development on site to be maintained a minimum of 25 feet from the sidelines. Senior citizens housing will generally require less separation than conventional family multiple units.

(iv) Access to the site will be via a single, 18-foot paved driveway in a location approved by the Department of Transportation. One hundred percent parking will be provided close to the building.

(v) The entire site will be landscaped including the provision of walkways, patios, and a variety of amenity areas for tenant use.

(vi) Development will meet the provisions of Policy 89 in that:

(i) It is in conformity with the Municipal Development Plan,
(ii) It is not premature or inappropriate,
(iii) It does not conflict with adjacent or nearby land uses,
(iv) The physical characteristics of the site are suitable.

4. Reference is made to Policies P-39 and P-40 which state:

P-39

It shall be the intention of Council to create a liaison between the Municipality, the Nova Scotia Housing Commission and Senior levels of government in order to:

(i) develop long range residential priorities, strategies and programmes,

(ii) optimize public investment in basic infrastructure and services, and

(iii) coordinate planning, promotional and development efforts.

P-40

It shall be the intention of Council to participate in any federal or provincial programme leading to the upgrading and rehabilitation of the housing stock, such as Residential Rehabilitation Programme and the Neighbourhood Improvement Programme and to encourage the use of any programmes providing assistance in the provision of adequate housing.

The senior citizens project would be developed under the Section 40 Residential Programme. Under this programme, the municipality would be a partner in the project and would enter into a Designation Agreement fixing details of land use, location, building design, as well as operation."

Sections 63(3)(4)(5) of the Planning Act read as follows:

" DETERMINATION BY BOARD
(3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy.

DECISION BY BOARD
(4) The Board may

(a) confirm the decision of the council;

(b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or

> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.
>
> RESTRICTION ON DECISION
> (5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

Since the subject site is located in an area which has a Municipal Planning Strategy, the main issue in this appeal is whether Council's decision cannot reasonably be said to carry out the intent of the Municipal Planning Strategy.

In the opinion of the Board, Policy P-23 is clear in its intention that Council preserve the existing single-unit dwelling residential environment within areas exibiting a residential designation shown on the Generalized Future Land-Use Map. However, the Municipal Planning Strategy also recognizes the need for a housing mix in these residentially designated areas. This intention is found in Policy P-33 which was quoted earlier in this decision and Policy P-26 which reads as follows: "Notwithstanding Policy P-23, Council may consider low density residential developments which are of a scale and location not inconsistent with existing neighbourhoods. In this regard two unit dwellings may be permitted by amendment to the zoning by-law and with regard to Policy P-89".

Policy P-33 allows Council to amend its Land-use By-law to allow multiple unit dwellings within the residential designation areas but in doing so Council must have regard to six criteria which are set out in the Policy. In the opinion of the Board, when considering whether to amend the Land-use By-law to allow the construction of a multiple unit accommodation pursuant to P-33, Council should regard the criteria of P-33 in light of their effect on reducing "the magnitude and impact potential of higher density uses on surrounding residences as well as on road and other community services." In the opinion of the Board, the decision of Council amending the By-law complies with one of the six criteria of P-33:

(i) the availability and capacity of water and sewer services;

The Board accepts the evidence of Mr. Hanusiack and the conclusions of the report of the Planning Department regarding the rezoning application's non-compliance with the remaining criteria of P-33.

In the opinion of the Board the proposed amendment does not comply with the following criteria of P-33:

(ii) the adequacy of access by way of collector or arterial streets;

(iii) separation distances from low density residential development;

(iv) the location and appearances of access and parking areas;

(v) the provision of amenity areas;

(vi) the provisions of P-89.

By not complying with five of the six criteria outlined in P-33, the proposed rezoning will not reduce the impact potential of the proposed use on the existing surrounding residences and therefore should not be allowed pursuant to this policy.

In the opinion of the Board Policies P-39 and P-40 dealing with "Housing Supplies and Programmes" are not applicable policies for Council to consider when judging an application to rezone residential designated land.

In the opinion of the Board the proposed rezoning will not preserve the existing single unit dwelling residential environment and therefore does not comply with Policy P-23 of the Municipal Planning Strategy.

In the opinion of the Board, Mr. Anthony Ninos and the remaining Appellants are aggrieved persons within the meaning of Section 63(1) of the Planning Act as they reside in close proximity of the site which was rezoned by Council's decision. The Board also is satisfied that the Appellants have discharged the onus on them of establishing that the Council's decision under appeal cannot reasonably be said to carry out the intent of the Municipal Planning Strategy.

The Board, having considered the evidence, having studied the Land-use By-law and the Municipal Planning Strategy and having heard argument of Counsel, is not satisfied that the Council's decision reasonably carries out the intent of the Municipal Planning Strategy and therefore reverses the decision of Council amending the Land-use By-law.

DATED at HALIFAX, Nova Scotia, this 4th day of April, A.D., 1984.

Darryl W. Wilson

DARRYL W. WILSON

Re Hughes et al. and Town of New Glasgow

PLANNING--ZONING--AMENDMENT--R2 TO I TO PERMIT USE AS HOME FOR BATTERED WOMEN--BEST INTERESTS OF THE MUNICIPALITY--THREE MAIN CONCERNS IN EVALUATING--PLANNING ACT, Ss. 63(1), (2), (3), (4), (5), (6), (7)

This is an appeal by a number of residents of the Mountain Road area of the Town of New Glasgow from the decision of the Town Council to rezone lands located at 140 Mountain Road from Residential Single Family (R2) to Institutional (I). The area is generally used for residential purposes and is zoned residentially. The subject lot contains about 37,000 sq.ft. with 330' frontage on Mountain Road and 180' on Fraser St. It contains a large dwelling formerly used as a nursing home. The application to rezone was made by the Tearmann Society, which proposed to use the property as a 15-bed home for battered women and children. The single family Hughes residence abuts the lot on Fraser St., and to the north, south and west the predominatnt use in the immediate neighbourhood is single family dwellings. To the east are some single family dwellings and vacant land and the development is scattered. Mountain Road is a major thoroughfare not heavily used at present, without public transportation or sidewalks. The Town has a Zoning By-law but no Municipal Planning Strategy (MPS). The Planning Staff of the Pictou County District Planning Commission recommended in favour of the rezoning, as did the Town's Planning Advisory Committee.

HELD--The appeal is dismissed and the decision of Council confirmed.

The Board must not, in accordance with ss. 63(5) and (6) of the Planning Act, interfere with a Council's decision, where there is no MPS in effect, unless it is inconsistent with or unnecessary for the protection of the best interests of the municipality. The Appellants' arguments concerning s.63(7) and "undue hardship" and "extraordinary and compelling circumstances" are not applicable here since they relate to the "applicant" and the Appellants are not the "applicant". The Appellants also argue the Charter of Rights and Freedoms and the Bill of Rights but there is no evidence of an invasion of rights and even if there were this Board has no jurisdiction to allow the appeal for that reason only: the Board must determine whether or not to allow the appeal pursuant to the explicit provisions of ss. 63(5) and (6). Remedies with respect to allegations concerning the Charter of Rights and the principles of natural justice are for a court of competent jurisdiction and not this Board. Concerning the best interests of the Town of New Glasgow, the Appellants have not discharged the onus on them to establish that Council's decision was inconsistent with or unnecessary for its protection. The Board accepts the expert planning evidence that the application to rezone be evaluated on three main concerns. On the first, the provision of municipal services, the Board is satisfied that the pressure or volume of water will, despite the concerns expressed by residents, be adequate. On the second, the impact on existing development, no cogent evidence was adduced to lead the Board to believe any devaluation of property would result. On the third concern, the impact on the overall community, the Board believes there is a need for this type of home and that the decision of Council is beneficial to the Municipality as a whole. As well it is extremely unlikely that the property would be put to the other uses permitted under the I zone. While under the I zone the property could be used as a private club, this problem could be addressed under a Municipal Planning Strategy with contract development provisions and amendments to the Land-Use By-Law. The Board may not instruct Council to amend a by-law in a manner which would permit the proposed use and restrict property to that use only or to that use together with all existing uses in the R2 zone.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Statutes of Nova Scotia 1983, Chapter 9;

IN THE MATTER OF: An appeal by Louis W. Hughes et al, residents of the Mountain Road area, New Glasgow from the decision of the Council of the Town of New Glasgow, made January 23, 1984 which rezoned lands situate at 140 Mountain Road from Single Family Residential (R2) Zone to Institutional (I) Zone.

BEFORE:	R.H. BLOIS, Q.C., Chairman ELIZABETH LAWRENCE, Vice-Chairman DARRYL W. WILSON, C.A., LL.B., Member
COUNSEL:	JAMES F.D. MITCHELL, one of the Appellants, represented the Appellants ROBERT B. MACDONALD, Q.C., for the Town of New Glasgow GREGORY J. MACDONALD, LL.B. for the Tearmann Society, optionee of the subject lands.

DECISION

This is an appeal under Section 63(1) of the Planning Act, Statutes of Nova Scotia, 1983, by Mr. & Mrs. Louis Hughes, Mr. & Mrs. Elwood Moser, Mr. & Mrs. Jake Roulston, Mr. & Mrs. Emerson Dempster, Mr. & Mrs. Dan Jenkins, Mr. & Mrs. Scott MacDougall, Mr. & Mrs. Donald Murray, Mr. & Mrs. Ian MacKenzie, Mr. & Mrs. Walter Murray, Mr. & Mrs. Buddy Heighton, Mr. & Mrs. Allan Murray, Mrs. Norman Brown, Mr. Gordon Brown, Dr. & Mrs. Ritchie Douglas and Mr. & Mrs. James F.D. Mitchell, all residents of the Mountain Road area of the Town of New Glasgow as aggrieved persons from the decision of the Council of the Town of New Glasgow made January 23, 1984 amending the zoning by-law of the Town by rezoning lands located at 140 Mountain Road from Residential Single Family (R 2) zone to Institutional (I) zone.

At the commencement of the hearing which took place on March 28, 1984, Counsel for the Town and Counsel for the Tearmann Society agreed that the appeal was properly before the Board.

The Appellants' Notice of Appeal dated February 9, 1984 was signed by T.E. Margeson, Q.C. of New Glasgow who had represented the Appellants prior to the hearing before the Board. Mr. Margeson did not appear at the hearing and the Appellants'case was conducted by James F.D. Mitchell, one of the Appellants.

The Notice of Appeal was received by the Board on February 13, 1984. Notice of the Council's decision to rezone the subject lands was advertised in a newspaper on January 28, 1984. The Notice of Appeal was received well within the twenty-one (21) day appeal period under Section 63(2) of the Planning Act.

The Notice of Appeal sets forth the following grounds for the Appeal:-

"1. The decision by the Council does not reasonably carry out the intent of the Municipal Planning strategy as envisaged by the existing by-law;

2. The decision of the Council is inconsistent with, and unnecessary for the protection of the best interests of the Municipality.

3. The appellants will suffer undue hardship if the appeal is not allowed;

4. There are extraordinary and compelling circumstances present which dictate that the appeal should be allowed;

5. The decision of the Town Council is inconsistent with the Charter of Rights and Freedoms and the Bill of Rights, and in particular Section 1(a) of The Bill of Rights; (b); 2(e); and under The Charter of Rights Section 15(1);

6. The actions of the Town Council were contrary to the principles of natural justice in that the Council had made up its mind to allow the amendment to the by-laws even before the public hearing was held and had closed their minds to any arguments presented at the public hearing, and before such action was voted upon by the Town Council;

7. Certain members of the Town Council took an unreasonable and biased interpretation of the representations made by and on behalf of the Appellant, that the representations were meant to infer that the classification should not be allowed because the Appellants were prejudiced against that class of people, and consequently such councillors were unable to make a reasonable decision on the issue before the Council, and consequently the decision was contrary to the rules of natural justice.

8. Town Council's decision to allow the reclassification was made on the advice of the Planning Advisory Committee of the Town of New Glasgow, which was composed of only members of the same Town Council with the exception of one person, who was a member of the public and whose vote was cast against the Advisory Committee's recommendation to allow the reclassification, and consequently the ultimate decision of the Town Council was based upon the recommendations of the abortive Planning Advisory Committee, and not upon the consideration of all the factors as brought out at the public hearing to consider the reclassification, and consequently, the Town Council of the Town of New Glasgow, acted

> without open minds and their decision was thus, contrary to the principles of natural justice.
>
> 9. Such other grounds as Counsel for the Appellants might advise prior to the hearing of this appeal."

Evidence on behalf of the Appellants was given by John E. Merrithew, a planner employed by the Pictou County District Planning Commission, James F.D. Mitchell, Dan Jenkins and Louis W. Hughes, area residents.

Evidence on behalf of the Town of New Glasgow was given by Robert Funke, the Town Engineer.

Evidence on behalf of the Tearmann Society was given by Constable Eugene Sullivan, a member of the Police Department of the Town of New Glasgow, Catherine Lambert and Margaret Cragg, both residents of the City of Halifax, the Rev. Paul Abbass, and Hazel Ann Felderhof, a resident of Mountain Road.

The subject lot is located in an area of the Town generally used for residential purposes and zoned residentially. It is located on the northern side of Mountain Road where it joins the southern side of Fraser Street. It is nearly triangular in shape and contains a large dwelling formerly used as a nursing home. The application to rezone the lot was made by the Tearmann Society to permit the Society to use the property as a 15 bed home for battered women and children. The subject lot contains approximately 37,000 sq. feet and has frontage of 330' on Mountain Road and 180' on Fraser Street. The single family residence of Mr. & Mrs. Hughes abuts the lot on Fraser Street.

The rear boundaries of three lots on the east side of Summit Street abut the subject lot on its western boundary.

Mountain Road is a major thoroughfare to and from the Town but is not heavily used at the present time. There is no public transportation system on Mountain Road and it has no sidewalks. To the north, south and west of the subject property the predominant use in the immediate neighborhood is single family dwellings. To the east are some single family dwellings and vacant land and the development is scattered. The Town's water reservoir is located a short distance to the east.

The Town does not have a Municipal Planning Strategy but does have a zoning by-law which came into effect in 1969 and was substantially amended in 1981.

In his opening remarks to the Board, Mr. Mitchell indicated that when the rezoning application for purposes of providing a home for the use of the Tearmann Society was first proposed it created an emotional issue for many residents of the Mountain Road area. He, however, assured the Board that the Appellants would conduct its appeal on the basis of what is in the best interests of the Town rather than on any emotional question.

Council for the Tearmann Society in his opening statement indicated his client would prove that there is a need for a home such as that proposed by his client and it would be shown that the Tearmann Society made several attempts to acquire property in other areas of the Town. He stated that the proposed home should be located in a residential area and was a use which was compatible with existing residential uses.

Counsel for the Town stated in his opening remarks that the Notice of Appeal raised many issues but the evidence would show that there was no substance in any of these issues.

Expert planning testimony was given by John E. Merrithew, a qualified planner employed by the Pictou County District Planning Commission for five years. He is the author of a staff planning report forming part of Ex. G 7, submitted to the Town Council respecting the application for rezoning the subject land. This report indicates that the proposal for rezoning was evaluated relative to the following concerns, viz:-

> "(1) The provision of adequate services (sewer, water, roads);
>
> (2) The impact of the proposed use on existing development; and
>
> (3) The impact of the development on the overall community."

The report states that "Overall, the proposed development will have no effect on the quality of services provided to the neighborhood nor will it result in any increased costs to the Town".

On the question of impact on the surrounding community, the report after mentioning that an 8 vehicle parking area is required under the provisions of the zoning by-law states that "Because no major changes, additions or alterations are proposed for the existing building or lot, staff feels there will be no noticeable environmental or visual conflicts with the surrounding area".

On the question of the impact of the proposed use on the community, the report indicates a need for a refuge for battered women and their children and that there is at present no such facility in Pictou County. The report states that "The close proximity of 140 Mountain Road to other services and amenities such as downtown, schools, churches, and police and fire protection adds to its suitability for the proposed use by offering a convenience to the people using the facility". The report states that "The services offered by the home for battered women, its location relative to existing services, and employment generated by its operation should have a positive impact on the community".

The staff report concludes by stating that:

> "Council must also be aware that granting this Institutional rezoning opens the property for other developments also permitted in the Institutional Zone.
>
> Originally the Tearmann Society had asked for either a Multi Family or Institutional zone classification. Planning Staff encouraged the Society to seek the Institutional classification because it would result in more control by Council over future land use on the property. Uses in the Institutional Zone include schools, hospitals, libraries, government offices and other uses over which Council has a degree of control beyond the Zoning Bylaw.
>
> The property has, in the past, been used as a nursing home; a use similar in nature to the proposed home for battered women. There are no records of any major conflicts between that use and surrounding development. Consequently, staff foresees few if any problems resulting from the operation of a home for battered women on the site.
>
> RECOMMENDATION
>
> It is staff's recommendation that this application for rezoning be approved."

Mr. Merrithew identified on the Town's Land Use (Zoning) map (Ex. G 7) the location of a property at the intersection of Alexander Street and Hunter Street in an R2 zone (that is a Single Family Dwelling Zone) which was the subject matter of a previous application for rezoning by the Tearmann Society. This application had been refused by the Council because the property could not meet the zoning by-law requirements for building set back.

Mr. Merrithew pointed out that the New Glasgow Town reservoir is located a few hundred feet east of the subject lot and to the west is a funeral home, school and church. He informed the Board that the Town's Planning Advisory Committee (P.A.C.) had recommended approval of the application for rezoning and that a public hearing had been held. He was of the opinion that there is a similarity of function between a nursing home use formerly carried on at the subject site and the proposed use as a home for battered women by the Tearmann Society.

On direct examination Mr. Merrithew agreed that a private club was a permissible use in I zone.

James F.D. Mitchell gave evidence himself for the Appellants. He is an insurance adjuster and resides at 159 Almont Avenue in the Town of New Glasgow. Almont Avenue runs north from Mountain Road. He is a former member of the New Glasgow Town Council and a former member of the Town's Planning Advisory Committee (P.A.C.). Mr. Mitchell read from a prepared submission included in the exhibit filed as G 3. He pointed out that a number of petitions opposing the rezoning signed by 43 persons were presented to the P.A.C. and the Council. Photocopies of these petitions are included in Ex. G 3.

Mr. Mitchell's evidence clearly indicates that there was an initial emotional reaction to the rezoning application to provide for a home for battered women. He assured the Board that he personally supports the Tearmann Society's effort to obtain a home which he admitted was a "social need in our community". He emphasized that the Appellants' concern was not the concept of a home for battered women but the action of the Council in creating a new zone in a residential area which he felt was not necessary.

Mr. Mitchell was of the opinion that there was no need for the Council to rezone the subject lot as there were a number of properties suitable and available in the Town and also in other nearby towns. He referred specifically to a number of other properties in the Town which he felt would serve the needs of the Tearmann Society. He was particularly opposed to the spot rezoning aspect of the subject lot to allow a multi residential use in a Single Family Dwelling (R 2) zone. He indicated that because there were other properties available which would not require rezoning for the Tearmann Society's proposed use, there was no need to rezone the subject lot. He also pointed out available properties located in the Town of Westville and Stellarton as well as in the Town of New Glasgow which he suggested might serve the purposes of the Tearmann Society. Photos of these properties are included in Ex. G 3.

Mr. Mitchell's submission points out that in the

Mountain Road area of the Town the water pressure from the Town's water supply is inadequate and therefore "the addition of a multiple occupancy facility would be a further drain on an already difficult situation".

Mr. Mitchell's submission points out that Mr. Merrithew, in 1981, carried out a study to determine which areas of the Town would be the most suitable for multi occupancy development. The subject lot is outside of these areas.

In the Appellants' written submission to the Board reference is made to all of the specific grounds of appeal set forth in the Notice of Appeal. Ground #1 states that the decision by Council "does not reasonably carry out the intent of the municipal planning strategy as envisioned by the existing by-law". Since there is no municipal planning strategy in effect for the Town, this ground of appeal has no application. The Appellants simply argue that since the subject lot was designated R 2 as the result of the 1981 zoning by-law revision,it should remain R 2. This argument fails to recognize that the planning process is an ongoing one and that the Planning Act clearly authorizes applications to rezone property. This Board must be guided by the provisions of the Planning Act in matters of rezoning and must not "interfere" with a Council's decision unless the decision cannot reasonably be said to carry out the intent of the Municipality's M.P.S. If the Municipality does not have a M.P.S. in effect, the Board must not "interfere" with the Council's decision unless it is inconsistent with or unnecessary for the protection of the best interests of the Municipality within the meaning of Section 63, sub-sections (5) and (6) of the Planning

Act". Ground #1 is therefore the ground that is most relevant to this appeal.

Grounds 3 and 4 relate to the provision of S.S. (7) of Section 63 of the Planning Act which sets forth a restriction on the Board to allow an appeal notwithstanding the provisions of S.S.'s (5) and (6) of Section 63 in the situation where the appeal to the Board is by the "applicant" for rezoning and in the opinion of the Board, "(a) the applicant would suffer undue hardship; or (b) extraordinary and compelling circumstances are present". These grounds of appeal have no application to the present case as the Appellants are not the "applicant".

Ground of appeal #5 invokes the provisions of the Charter of Rights and Freedoms and the Bill of Rights. The Appellants in their submission state "that to force a rezoning against the general wishes of the people in the area is in fact an invasion of their rights and especially so where it is believed that the Town Council of the Town of New Glasgow conducted a meeting where the people affected were not present, where a discussion took place at such meeting". It is the opinion of this Board there was no evidence before the Board of any invasion of the Appellants' rights during the period that the Council was considering the application for rezoning. It is the further opinion of this Board that even if there was some breach of the Appellants' rights by the Council, this Board has no jurisdiction to allow the appeal for that reason only. The Board notes that Section 15 of the Charter of Rights is not now in force. The Board must determine whether or not to allow the appeal pursuant to the explicit provisions of S.S.'s (5) and (6) of Section 63 of the Planning Act.

The Appellants' remedy with respect to the allegations in Grounds 5, 6, 7 and 8 are to a court of competent jurisdiction and not to this Board.

The Appellants' written submission stresses the point that there was no "need" for the Council's decision as there are other properties on the market in the Towns of Stellarton and Westville which could be acquired and which would not necessitate a rezoning process and also that there were suitable properties available in the Town of New Glasgow. The Appellants submit that because there is no "need" to rezone, the Council's decision "was not in the public interest".

Mr. Mitchell's personal concern was that the decision was a "spot rezoning" which he considered to be unjustified and unnecessary. He personally was not concerned that property values might decrease as the result of the decision to rezone the subject property and establish a home for battered women.

The Appellants called Dan Jenkins, who resides at 320 Fraser St. Mr. Jenkins is one of the Appellants. His residence is directly across the street from the subject site. He stated that he looked at the homes operated by the Tearmann Society in Halifax and Sydney. He stated that the Society's home in Halifax was in an area where there were high-rise apartment buildings and in Sydney, in an area containing both single family dwellings and multi family dwellings.

On cross-examination, when asked what his concerns were about the rezoning of the subject site, Mr. Jenkins stated that he did not have any feeling of concern about the building on the subject site being used as a nursing home but he did not wish to see this building used as a home for battered women. Mr. Jenkins considered that R 2 was the proper zoning for the subject site and he wished to keep it that way. When Mr. Jenkins purchased his property in 1979 the subject property was used as a nursing home.

Evidence on behalf of the Appellants was given by Louis W. Hughes, one of the Appellants. Mr. Hughes is retired and resides at 305 Fraser Street abutting the subject property. His problem is that he lacks sufficient water pressure from the Town's water system. He built his home in 1960 and his water pressure has always been poor. He stated he brought his problem to the attention of the Town Engineer on several occasions and has learned to live with the poor water pressure. On cross-examination, Mr. Hughes admitted that the nursing home next to his property had operated for 18 years and when it ceased operation over a year ago, his water pressure remained poor. Mr. Hughes also pointed out that when he purchased his home in 1960, it was in a single family dwelling area and he wished to remain in that type of area.

The Town Solicitor called Robert Funke, the Town's Engineer for the past two years. He stated that the Town's reservoir was located on Mountain Road about 300' from the subject property. He was familiar with Mr. Hughes' property. Mr. Funke's evidence was that the Town's water supply system operated on a gravity feed basis and that there was a sufficient volume of water to service the Town's customers. He did acknowledge that water pressure is a problem in some areas of the Town. He was of the opinion that a high density use of the subject property would not affect the existing water service of area residents including Mr. Hughes. He also indicated that Mr. Hughes obtains his water from a 4" main on Fraser Street whereas a 10" main services Mountain Road. He stated that a customer getting service from the 10" main could enjoy more pressure than a customer from the 4" main. He stated that water service to the subject property would be off the 10" main on Mountain Road.

Counsel for the Tearmann Society called Mrs. Kathy MacKay, a "community developer" volunteer worker involved in the Society's crisis service for battered women.

Mrs. MacKay gave evidence as to the work of the Society in the Pictou area. At first a crisis phone line was established and this led to calls from women requiring assistance and advice. This led to a study being conducted which indicated a need for a home for battered women to serve Guysborough, Antigonish and Pictou Counties. This led to the incorporation of the Tearmann Society for Battered Women on September 6, 1983 under the provisions of the Societies Act. The principal object of the Society is "To supply and render services to battered women with the aim of enabling them the freedom and emotional support to reassess their situation and arrive at their own decisions regarding actions towards their future".

To further its goals the Society's objects includes the following:

to "own, operate and maintain a house(s) for the temporary accommodation of battered women and their children who are in a crisis situation".

The Society's Certificate of Incorporation, a copy of which is filed as Ex. G 12 states that "the activities of the Society are to be chiefly carried on in Pictou County, Nova Scotia". Cathy MacKay was one of the ten persons who signed the Memorandum of Association of the Tearmann Society.

Mrs. MacKay gave evidence as to the need for a home for battered women in the Pictou County area and the work of the Tearmann Society in its efforts to purchase a suitable home with a 20 person capacity. She indicated that a 15 person capacity is sufficient for the Society's purposes. She explained that there is a home in Halifax but if women in need in the Pictou area had to go to Halifax, this would be another crisis. She carefully reviewed the various properties that the Society had looked at before entering into an agreement to purchase the subject property. This agreement to purchase filed as Ex. G 16 is conditional upon the purchaser being able to obtain an "amendment to the Town of New Glasgow By-Laws in order to permit the use of the within lands and premises as a home or a shelter for battered women and children". The date for completing the purchase was February 29, 1984 but the agreement was extended by the parties to April 15, 1984 and could by mutual agreement be further extended.

Mrs. MacKay indicated that the subject property could accommodate 15 persons including children. Occupancy would vary from 75% to 100%. The average length of stay would be 3-4 weeks. She stated that a month's work in carrying out some renovations would be required before the home could open.

Constable Eugene Sullivan, a member of the New Glasgow Police Department who is involved in matters of family violence testified as to the need for a home such as the one proposed for the subject site.

Catherine Lambert, the Executive Director of Bryony House in Halifax testified about the operation of this facility for battered women. This home is located in a residential area comprising single family dwellings and multi family buildings. She indicated that in her 5 year's experience in Halifax the home has received no complaints. Her opinion is that this type of home should be located in a residential neighborhood.

Ms. Margaret Cragg, a Halifax resident in the area in which Bryony House is located testified that she was not aware of any problems with the neighbors in the area. She is a member of the Board which operates Bryony House.

The Rev. Paul Abbass, the curator of the Our Lady of Lourdes Parish and the President of the Pictou County Council of Churches testified as to the need for a home for battered women in the community. He is the Treasurer of the Tearmann Society.

The last witness to be called was Mrs. Hazel Ann Felderhof, wife of a physician and the mother of 4 children who resides at 195 Mountain Road. She gave evidence in support of the use of the subject site as a home for battered women. She is a member of the District School Board. She has lived at this address for 1 year and had previously lived on Temperance Street in New Glasgow.

Oral argument was made following the completion of the evidence. Mr. Mitchell emphasized that a need must be demonstrated before a Council should change the zoning of one property in an area of single family dwellings. While admitting that a social need for a home such as the one proposed was evident, there was no need to locate the proposed home on the subject property as he was of the opinion that there were other properties available which he considered would meet the requirements of the Tearmann Society. He pointed out that the staff report prepared by the planner, Mr. Merrithew, in recommending to the Council approval of the rezoning application was in conflict with a previous study map prepared by Mr. Merrithew which earmarked two areas in the Town as being appropriate for the development of multi family use buildings because of their proximity to schools, shopping areas, recreational facilities and water mains. The subject site is outside the two areas previously earmarked by Mr. Merrithew.

Mr. Mitchell argued that the planner was aware of other properties suitably zoned when he recommended approval of the rezoning application for the subject site. He also expressed some concern by the Appellants that the Council's decision in rezoning the subject site to Institutional (I) zone opened the door for uses other than the one proposed by the Tearmann Society. Mr. Mitchell concluded his argument by requesting the Board to restore what he described as the "sanctity"of the single family residences in his area.

In his presentation, Counsel for the Tearmann Society argued that the burden is on the Appellants to satisfy the Board that the Council's decision was inconsistent with or unnecessary for the protection of the best interests of the municipality and that burden was not satisfied. He argued that the evidence indicated a need for the type of home proposed by the Society. With respect to the plan prepared by Mr. Merrithew showing areas in the Town best suited for development, Counsel for the Society said that this plan was prepared only for discussion purposes. He further argued that the evidence did not disclose any prejudice to the Appellants as the result of the Council's decision and it was not proven that the majority of residents in the subject area were opposed to the rezoning. He also pointed out that under the R 2 zone one of the permitted uses was a community centre which was not defined in the Land Use By-law (Ex. G 5). He argued that the proposed home was a benefit to the whole community and therefore is in the best interests of the Town.

Counsel for the Town argued that the burden of proof is on the Appellants, that the Council's decision was inconsistent or unnecessary for the protection of the best interests of the Town pursuant to Section 63(6) of the Planning Act, and the evidence indicates that this burden was not discharged. He argued that there was no evidence that the proposed use of the subject property would impair the value of other properties in the area. He also indicated that it is not the function of the Appellants to determine where the Tearmann Society should locate its proposed home.

In rebuttal, Mr. Mitchell argued that the initial emotional issue was over and was no longer an issue. He agreed that there was a need for a home such as the one proposed but that was not in itself a sufficient reason for the Council rezoning the subject property from R 2 to I.

It is clear from the evidence of Mr. Mitchell and argument presented by him on behalf of the Appellants, that initially the Tearmann Society's application to have the subject property rezoned and the Council's decision to rezone created an emotional issue for the Appellants based on their concern and apprehension and uncertainty as to what effect, if any, the rezoning from R 2 to I would have on their property values and the stability of their neighborhood. It is also clear from the evidence of Mr. Mitchell and argument presented by him on behalf of the Appellants that at the time of the hearing, this emotional issue was no longer a concern or indeed an issue.

The appeal having been brought by the Appellants as "aggrieved" persons under the provisions of Section 63(1)(a) of the Planning Act, the Board has a statutory obligation under S.S. (3) of Section 63 of the Planning Act "to determine whether the decision of the Council reasonably carried out the intent of the municipal planning strategy". In this case however there is no municipal planning strategy in effect for the Town of New Glasgow and the Board has a statutory obligation under S.S. (6)

of Section 63 of the Planning Act not to "interfere with the decision unless the decision of the Council is inconsistent with or unnecessary for the protection of the best interests of the Municipality".

The evidence indicates that the subject property is located in a neighborhood generally zoned Residential Single Family Dwelling (R 2) under the Town's Land Use By-law, a copy of which was filed as Ex. G 5. It is noteworthy that the Town's Land Use By-law makes provision for a Residential Suburban (R 1) zone in which the permitted uses include "a Single Family Detached Dwelling" along with other uses, whereas, the R 2 zone permitted uses are as follows:

> "Single family detached dwellings
>
> Duplex dwellings
>
> Semi-detached dwellings
>
> Converted dwellings (to a maximum of two dwelling units)
>
> Parks and community centres
>
> Elementary schools, secondary schools, and churches subject to the Institutional (I) zone requirements
>
> Day nurseries subject to the requirements for duplex dwellings"

Mountain Road is a major thoroughfare to and from the Town which is underutilized at the present time. The subject lot was used for many years as a nursing home, this use being a non-conforming one which was discontinued over a year ago.

There is no doubt a need exists in Pictou County for a home for battered women. This need has been clearly shown by the evidence of Kathy MacKay and the Rev. Paul Abbass. There is no evidence that this need may only be fulfilled by the establishment of a home on the subject property. However, the evidence indicates that the Tearmann Society made some considerable effort in trying to obtain a suitable property in Pictou County and in fact examined a number of properties offered for sale before selecting the subject property as being the most suitable one for its purposes.

The Board having visited the subject property, and surrounding neighborhood, having carefully considered the evidence adduced at the hearing, having listened to argument presented on behalf of the Appellants, the Tearmann Society and the Town, is of the opinion that the Appellants have not discharged the onus on them of establishing that the Council's decision was either inconsistent with or unnecessary for the protection of the best interests of the Town of New Glasgow within the meaning of S.S. 6 of Section 63 of the Planning Act.

The Board accepts the expert planning evidence of the planner, John Merrithew, who evaluated the application for rezoning based on three main concerns, namely; (1) the provision of municipal services (2) the impact on existing development and (3) the impact on the overall community; that is, the Town of New Glasgow. The Board is satisfied based on the evidence of the Town's Engineer, that the use of the subject property for purposes of a home for battered women would not affect either the pressure or volume of water available to the area residents.

The Board is also satisfied that no cogent evidence was adduced which would lead the Board to believe that the Council's decision would cause any devaluation of other properties in the neighborhood of the subject property.

The Board notes that both Mr. Hughes and Mr. Jenkins, witnesses who opposed the Council's decision had no objection to the subject property being used as a nursing home.

The Board is of the opinion that it must confirm the Council's decision because the Appellants have not discharged the onus on them of establishing that the Council's discussion was inconsistent with or unnecessary for the protection of the best interests of the Town. The Board is satisfied from the evidence adduced and from the Board's examination of the subject property and the neighborhood in which the property is located that the Council's decision was consistent with the protection of the best interests of the Town.

In coming to this conclusion, the Board does so on the basis that the Council's decision is beneficial to the Municipality as a whole and is therefore for the protection of the best interests of the Municipality even though the decision may possibly have some potential adverse effect on the existing land uses in the immediate neighborhood of the subject property. In the opinion of the Board the proposed use of the subject property by the Tearmann Society would not have any adverse effect on the neighborhood. Furthermore it is the opinion of the Board that it is extremely unlikely that the subject property would be put to the other uses permitted under the (I) zone.

The Board in confirming the Council's decision is of the opinion that Council's decision to rezone the subject property to permit a use which undoubtedly is in the Town's interest is not a precedent to approve other spot rezonings in the subject neighborhood.

Under Section 63(4) of the Planning Act the Board has three options open to it, namely:

> "(a) confirm the decision of the council;
>
> (b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or
>
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board."

S.S. (6) of Section 63 of the Planning Act which is applicable to this appeal sets forth a restriction on the Board not to "interfere" with the Council's decision where the decision is not inconsistent with or unnecessary for the protection of the best interests of the Municipality. S.S. (6) reads as follows:

> "Where there is an appeal from a decision of council with respect to a zoning by-law in force by Section 112, the Board shall not interfere with the decision unless the decision of the council is inconsistent with or unnecessary for the protection of the best interests of the municipality."

One concern raised by the Appellants that merits some comment from the Board is their concern that if the subject property is rezoned to Institutional (I) zone for the specific purpose of permitting the Tearmann Society to use the property for its purposes which is the case at hand and that specific purpose or use is not entered into, then the (I) zone category permits a number of other uses some of which may be less desirable than the specific use proposed. One such permitted use is that of a private club which may or may not be as compatible with the existing uses in the neighborhood as the use proposed by the Tearmann Society. Ideally, this concern could be addressed if the Town had in effect a Municipal Planning Strategy (MPS) with an accompanying Land Use By-law with provisions for the approval of contract development which could be utilized to allow the specific use proposed and effectively prevent other uses which might be less desirable. Unfortunately at this point in time no such procedure is available to the Town.

It is the Board's understanding that the Town is now in the process of preparing a MPS and Land Use By-law which could contain contract development provisions. Furthermore, in the process of updating and improving its Land Use By-law the Town should be able to adequately provide for land use categories which will offer protection from uses which may be considered undesirable or incompatible with existing uses.

Because of the restrictions on the power imposed by S.S. (6) of Section 63 of the Planning Act not to interfere with the Council's decision, the Board is of the opinion that it may not invoke the provisions of S.S. (4)(c) of Section 63 to instruct the Council to amend the by-law in a manner which would permit the proposed use of the property and restrict the property to that use only or to that use together with all existing uses in the R 2 zone. In order to invoke S.S. (4)(c) the Board would be obliged to allow the appeal and in doing so would be interfering with the Council's decision which it may only do if it determines that the Council's decision was either inconsistent with or unnecessary for the protection of the best interests of the Town. The Board is of the opinion that on the evidence it cannot make this determination.

The Board therefore, pursuant to Section 63 (4)(a) of the Planning Act, confirms the decision of the Council.

An Order will issue accordingly.

DATED at HALIFAX this 1st day of June A.D., 1984.

R H Blois

Members of The Nova Scotia
Municipal Board

Francis v. City of Halifax

PLANNING--ZONING--AMENDMENT--REFUSAL TO REZONE FROM R-2 TO R-3--PREVIOUSLY ZONED R-3 AND DOWN-ZONED TO R-2--8-UNIT APARTMENT NOW NON-CONFORMING USE--CARRY OUT INTENT OF MPS--UNDUE HARDSHIP--PLANNING ACT, Ss. 63, 86, 87--DRAFT PENINSULA NORTH DETAILED AREA PLAN

This is an appeal from a decision of Halifax City Council refusing to rezone property at 6124 Lawrence St. from R-2 General Residential Zone to R-3 Multiple Dwelling Zone. An 8-unit apartment building presently exists on the subject property, having been built, with an approved lot modification, in 1975 when the property was zoned R-3. The property was made a non-conforming use in 1976 when the general area was rezoned to R-2. The Appellant had no immediate plans to effect any changes to the building or the use of his property, but was concerned about devaluation as a result of the down-zoning and about not being able to rebuild as of right if the building was destroyed. Local residents opposed the proposed rezoning.

HELD - Council's decision is confirmed and the appeal dismissed.

The Appellant has not discharged the onus on him of proving that the decision of Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy. The refusal to rezone supports the previous down-zoning of the surrounding area in 1976. There was no evidence that affected property owners could not have raised their objections to the proposed R-2 zoning then. Any hardship incurred by being made a non-conforming use is mitigated by s. 86(1)(a) of the Planning Act allowing rebuilding of the building if damaged or destroyed to 75% or less of the market value, and by the less restrictive provisions authorized by

s. 87 and proposed in the draft detailed area plan. The ability of the Appellant to continue the existing R-3 use has not been so restricted as to constitute an undue hardship.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, Statutes of Nova Scotia, 1983;

- and -

IN THE MATTER OF: An Appeal by FARID FRANCIS from a decision of Halifax City Council made December 15, 1983, which refused to rezone a property at 6124 Lawrence Street from R-2 General Residential Zone to R-3 Multiple Dwelling Zone.

BEFORE: ELIZABETH LAWRENCE, Vice-Chairman

COUNSEL: JAMES L. FRANCIS, without Counsel for the Appellant Farid Francis, his father.

M.E. DONOVAN, LL.B., for the City of Halifax, N.S.

DECISION

Notice of Appeal (Exhibit F-1) dated January 5, 1984, was filed with the Board January 5, 1984, by James Francis for Farid Francis, from a decision of the Council of the City of Halifax, made December 15, 1983, which decision refused the application of Farid Francis to rezone the property at 6124 Lawrence Street from R-2 General Residential Zone to R-3 Multiple Dwelling Zone.

The hearing for this appeal took place in the Expropriations Compensation Boardroom, 1660 Hollis Street, Suite 904, in the City of Halifax on March 15, 1984.

James Francis confirmed by sworn testimony that he had served the required Notice of Hearing on those persons that the Board directed be served. It was agreed by both parties that the appeal was properly before the Board and the Board proceeded to hear the appeal on the merits.

The grounds for the appeal as stated in the Notice of Appeal are as follows:

> "(1) Council specifically approved the building on the subject property in 1975.
>
> (2) The building is already existing and therefore complies with Policy 1.2 of Section 2 of the Planning Strategy.
>
> (3) The owner of the building has incurred undue hardships in that the value of the building has been depreciated by an estimated 25%.
>
> (4) Other reasons as may appear."

The subject property lies on the south side of Lawrence Street between Windsor Street and Chebucto Lane in part of the Peninsula North Detailed Area Plan area. The area in which the subject property is located is covered by Schedule "C" of the Land-use By-law, the principle effect of which is to limit R-3 uses to 50 feet in height and to a total of not more than 25 dwelling units.

The property at 6124 Lawrence Street owned by the Appellant contains an 8-unit apartment building constructed as the result of the approval by Council in 1975 of a lot modification required because of a 300 square foot deficiency in lot size. At that time, the property and the surrounding area was zoned R-3 Multiple Dwelling Zone. In 1976 this area, including the subject property, was rezoned from R-3 to R-2 General Residential Zone.

The result of that rezoning was to make the property a non-conforming use.

In March 1983, James Francis had applied to rezone the subject property from R-2 to R-3, citing alleged depreciation to the value of the building from the down-zoning which occurred in 1976. Referring to the application to restore the pre-1976 zoning to the subject property, a staff report to Council dated December 1, 1983 (Exhibit F-8) states:

> " Upon further examination of this application, staff determined that the reason the applicant felt the value of the building was depreciated was that being a non-conforming use, it could not be rebuilt if destroyed.
>
> This matter was reviewed by staff and it was concluded that a rezoning to R-3 would not permit an apartment building (should the existing one be destroyed) to be built on this site as-of-right. As the lot is 300 sq.ft. undersized, an action by the City would be required to approve construction on this undersized lot. Therefore, a rezoning was not seen as the answer to the applicant's concern.
>
> On August 3, 1983, the applicant was informed that a rezoning of 6124 Lawrence Street would not achieve the results he anticipates. Staff suggested to the applicant that a contract development, if approved,was the only method which could guarantee reconstruction of the building, should it be destroyed.
>
> On September 16, 1983, the applicant advised staff to proceed with a contract development application for 6124 Lawrence Street."

The Staff Report prepared for the Planning Advisory Committee on the application for contract development recommended refusal of the application. The applicant withdrew his application for contract development and requested that staff process his original application for rezoning from R-2 to R-3. Staff agreed because the Planning Act, which came into force June 1, 1983, contained new provisions which would allow the reconstruction of a non-conforming use on an undersized lot.

Mr. James Francis gave evidence on behalf of his father. Mr. Francis felt that his father's original investment could best be protected by the restoration of the original zoning, a change which would "restore the rights of the owner and in no way have any detrimental effect on the City of Halifax." He stated that his father, the owner of the subject property, had not been informed or aware of the rezoning of the area from R-3 to R-2 in 1976. Mr. Francis emphasized that the current application to rezone the subject property was merely to restore the proper original zoning, that no new construction was planned and that there would be "absolutely no changes to the present situation within the surrounding neighbourhood."

Mr. Francis submitted a small exerpt (Exhibit F-7) entitled Sketch "A" from a zoning map of the City of Halifax dated March, 1978 (Exhibit F-6). The zoning map exerpt was coloured to highlight seven properties in the area bounded by Coburg Road on the south, Robie Street on the east, Summit Street on the north and Connaught Street on the west. All the properties so designated on Exhibit F-7 are zoned R-3 in areas predominately zoned R-2. Mr. Francis stated that these properties illustrate that other R-3 spot zoning exists in the vicinity of his father's property and therefore the opinion expressed in the Staff Report of December 1, 1983 (Exhibit F-8) is invalid which states:

> " There are other similar non-conforming apartment buildings in this area which may request similar treatment. Whereas this issue is to be considered as part of the Peninsula North Secondary Planning Strategy, an approval of this rezoning may be viewed as a precedent and jeopardize dealing with this matter objectively in the plan."

Mr. Francis stressed that Council had specifically given the lot modification approval necessary for the construction of the 8-unit apartment building on the subject property in 1975 but then rezoned the area R-2 only a year later, making the recently constructed apartment building non-conforming.

Mr. Philson Kempton, an accredited Appraiser, gave evidence on behalf of the Appellant. His study of the subject property (Exhibit F-18) prepared at the request of Mr. Francis concluded that the market value of 6124 Lawrence Street had been reduced by 25% by the down-zoning of the site after construction of the apartment building. The figure of 25% he stated, was the result of analysis of actual sales in the metropolitan region which were zoned R-2, R-3 and R-4. Mr. Kempton acknowledged that he had done a cursary examination of the property but not a thorough valuation. In cross-examination, Mr. Kempton stated that he had not analysed R-2 and R-3 multiple use buildings and that his estimated devaluation of the subject property because of down-zoning related to the land component only.

Two neighbourhood residents gave evidence in opposition to the proposed rezoning of the subject property from R-2 to R-3.

Mr. Grant Wanzel, a resident at 6158 Lawrence Street for four years, assisted in the drafting of a petition circulated in the neighbourhood prior to the Board's hearing and filed as Exhibit F-9. The petition contains 160 names all of whom are Ward 4 area residents living on Lawrence, Harvard, Duncan and Allan Streets.

The preamble of the petition is in the form of a letter addressed to the Board, dated February 27, 1984, and states:

> "Dear Members,
>
> Please accept this letter as a statement of the will and concerns of the undersigned. We are residents of the area directly concerned with the request by Farid Francis for the rezoning of the property known as 6124 Lawrence Street.
>
> The detailed Area Plan for this area of the City enshrines the principle of the neighbourhood stabilization. Thus, in principle, we are opposed to any rezoning of our neighbourhood and are specifically opposed to a change in zone status for this property. We feel such a change could set a precedent which would unhappily affect the quality of life in our area. Our neighbourhood's fabric has strengthened greatly in the last few years under the R-2 Zone designation. Such proposed rezoning would be a regressive step. It would lead to increased vehicular traffic and people in an already congested area.
>
> We respectfully offer this comment to you from residents of a unique and happy part of Halifax. The threat of rezoning is disturbing and we trust that our neighbourhood will remain zoned R-2.
>
> Thank you for your consideration."

Mr. Wanzel stressed that the down-zoning of the area in 1976 has had positive effects in stabilizing the neighbourhood, encouraging family ownership of property and an appreciation in property values. He stated that he was concerned about the uncertaintly of what might happen to the subject property if it were zoned R-3 and felt any up-zoning was a threat to the stability of the neighbourhood.

Mrs. Beatrice MacDonald, who lives at 6125 Lawrence Street, across from the subject property, has lived in the neighbourhood for 65 years. She stated that she had circulated the petition and signed it personally. From her perspective, she felt that the neighbourhood has been positively affected by the down-zoning from R-3 to R-2 in 1976. She cited a trend to increased home ownership and more families with children moving into the area as benefits noticeable to her since the rezoning of 1976. She expressed anxiety that a change in zoning on the subject property could lead eventually to changes in use which could adversely affect the neighbourhood.

Counsel for the City of Halifax called three planning witnesses: Richard Matthews, Director of Planning for the City since 1975; John Heseltine, a Planner II employed with the City since 1979; and Gary Porter, a Senior Planning Technician.

Mr. Matthews gave evidence on the detailed area plan process in the Peninsula North Planning Area which had led to the down-zoning from R-3 to R-2 in 1976, and on relevant policies of the City's Municipal Planning Strategy (MPS). A city staff report to Council dated May 11, 1976 (Exhibit F-11) was filed as evidence on the historical background and planning rationale for the rezoning from R-3 to R-2 in 1976 of the area bordered by Chebucto Road, Allen Street, Chebucto Lane and Robie Street. The staff report was prepared, according to Mr. Matthews, in response to a concern by members of Council about land use in the area prompted by public meetings on the future development of the Farmer's Dairy property on Chebucto Road. In 1976 the area in which the subject property is located was described as "overzoned" in the staff report, Exhibit F-11, as follows:

> " Development within the R-3 portion of the area reflects uses which, for the most part, would be allowed within an R-2 zone. The present R-3 zoning, which permits much more intensive development than that which exists, has been relied upon in only very few instances. It is the opinion of staff that the perpetuation of a zoning pattern which would allow for significantly different development to occur creates a serious and unnecessary instability in the neighbourhood because it creates an unreasonable level of uncertainty about the future of the area. A downzoning of the area to a residential category consistent with the existing development pattern, with appropriate safeguards for modifications to be made by due process in the absence of a Municipal Development Plan for the area, would provide necessary stability consistent with policy and would allow for reasonable change to occur, guided by policy with appropriate public inputs to City Council."

Mr. Matthews stated that since the intent was at that time to maintain the R-2 character of the area, there was no onus on the City to maintain the R-3 zoning. If there had been a cluster of R-3 uses in the area, he felt that that may have justified the protection of continued R-3 zoning for those properties but existing R-3 uses at the time (1976) were few and isolated. Mr. Matthews concluded that Council's action in down-zoning this area from R-3 to R-2 met the relevant policies of the "Statement of Policies and Objectives for the Municipal Development Plan" adopted by Council in March 1976, two years prior to the adoption of the Municipal Planning Strategy, and that there were no policies of the "Statement of

Policies and Objectives" with which Council's actions were inconsistent.

John Heseltine, a planner with the City, gave evidence on the present land use in the area bounded by Robie, Cunard Chebucto, Harvard, Allan and Welsford Streets as shown on a coloured plan filed as Exhibit F-14. The plan distinguishes 1-2 unit residential buildings, 3-4 unit residential buildings, buildings containing more than 4 residential units, and commercial and industrial buildings. The land use information illustrated on Exhibit F-14 was collected in 1978 and field checked March 12, 1984. In that 6-year interval, 7 dwellings were converted from single family occupancy to multiple and 13 dwellings were converted from multiple use to single family.

On the issue of the limitations imposed on the subject property by the building's current non-conforming status, Mr. Heseltine gave evidence as the planner responsible for two years for the detailed area plan for Peninsula North. In the Draft Peninsula North Detailed Area Plan dated October 1983, filed as Exhibit F-15, he pointed out that Policy 1.7 allows variations in the restrictions on non-conforming uses as provided for in Section 87 of the Planning Act which states:

> " 87(1) A municipal planning strategy may provide for the variation of the provisions of Section 85 or 86, but no variation shall increase the restrictions in Sections 85 and 86.
>
> (2) The policies adopted pursuant to subsection (1) may provide for:

(a) the extension, enlargement or alteration of non-conforming structures or structures containing non-conforming uses;

(b) the extension of a non-conforming use of land;

(c) the rebuilding of a non-conforming structure, or structures containing a non-conforming use, after destruction;

(d) the recommencement of a non-conforming use of land or a structure after it has been discontinued for a continuous period in excess of six months.

(3) The policies adopted pursuant to this Section may be carried out through the land-use by-law, or by development agreement, and where the council has provided for the latter, Sections 66 to 73 apply mutatis mutandis to any agreement entered into pursuant to the Section."

Policy 1.7 in the Draft Peninsula North Detailed Area Plan states:

"Policy 1.7 In residential areas the City shall permit under the provisions of Section 87(1) of the Planning Act, the reconstruction to original size and use of a structure that:

(i) is non-conforming because of size;

(ii) existed at the date of adoption of this Peninsula North Plan; and

(iii) is destroyed by fire or otherwise."

The draft plan has been approved by the Planning Advisory Committee's Peninsula North SubCommittee. It must be approved by the Planning Advisory Committee and by Council before being forwarded to the Minister as an amendment to the Municipal Planning Strategy (MPS).

Gary Porter was the author of the staff report of December 1, 1983 filed in evidence as Exhibit F-8. In his opinion the 8-unit apartment building on the subject site was built to the maximum size allowable in the R-3 zone but could accommodate 5 or 6 additional persons if the building were "rearranged internally" to increase the number of units. Mr. Porter stated that he believed that the rezoning of the subject property would be a negative precedent and that the rezoning from R-2 to R-3 would not accomplish any more for the owner than is currently available on the issue of his ability to rebuild should the building be destroyed more than 75%.

In cross-examination, Mr. Porter agreed that a previous staff report on an application by Mr. Francis for contract development for the subject property, Exhibit F-19, had recommended refusal for similar reasons - the precedent which might lead the owners of other R-3 non-conforming uses to make similar applications, and the fact that the approval of contract development for the subject property would be in conflict with the reasons for the down-zoning from R-3 to R-2 in 1976. Mr. Francis withdrew his application for contract development before the date when Council was due to consider it.

In an appeal pursuant to Section 63(1) of the Planning Act, S.S. 3 states that the Board "shall determine whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy". Having considered the merits of the appeal, the Board, according to Section 63(4) may:

> "(a) confirm the decision of the council;
>
> (b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or
>
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board."

The Board is restricted in coming to a decision to allow an appeal by Section 63(5) which states:

> " The Board shall not allow the appeal unless the Board determines that the decision of the Council cannot reasonably be said to carry out the intent of the municipal planning strategy."

On the basis of the evidence adduced at the hearing, having considered the argument of the Appellant and Counsel for the City and having visited the subject property and surrounding neighbourhood, the Board is of the opinion that the Appellant has not discharged the onus on him of proving that the decision of Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy. Council's decision to refuse to rezone the subject property supports the previous down-zoning of the area surrounding the subject property in 1976. There was no evidence led which suggested that the rezoning of this neighbourhood in 1976 was carried out without due notice to those affected and a public hearing at which objections could have been raised by property owners who were opposed to the proposed R-2 zoning. Any hardship incurred by the owner of the 8-unit apartment building on the subject property which became a non-conforming use in 1976 is mitigated by Section 86(1)(a) of the Planning Act, which allows a non-conforming use to continue even if the building is damaged or destroyed up to 75% of its market value, and by Section 87 which allows less restrictive provisions on the continuation of a non-conforming use to be incorporated in a Municipal Planning Strategy. Although not yet incorporated in the MPS, the draft detailed area plan for the area proposes to implement the provisions of Section 87 of the Planning Act.

In the opinion of the Board, the ability of the Appellant to continue the existing R-3 use of the subject property has not been so restricted as to constitute an undue hardship. Additionally, the evidence presented by the Appraiser on the alleged devaluation of the subject property because of the non-conforming status of the apartment building did not categorically support the Appellant's contention that the building on the subject property had been devalued 25% by the rezoning from R-3 to R-2 in 1976.

For these reasons, the Board finds that the decision of Council to refuse to rezone the property of the Appellant at 6124 Lawrence Street reasonably carries out the intent of the Municipal Planning Strategy. The decision of Council is therefore confirmed and an Order will issue accordingly.

DATED at HALIFAX, Nova Scotia this 8th day of June, A.D., 1984.

E A Lawrence

ELIZABETH LAWRENCE
Vice-Chairman

Shatford et al. v. Director of Planning

PLANNING--REGIONAL DEVELOPMENT--PERMIT GRANTED FOR FISH PLANT--WHETHER CONFORMS TO THE REGIONAL DEVELOPMENT PLAN--MATTERS TO BE CONSIDERED--PLANNING ACT, Ss. 4, 5(1),(7),(8), 7(1)

This is an appeal by various individuals from a decision of the Director of Planning granting a Regional Development Permit to Ocean Farmers Ltd. for a fish plant on a vacant 2.26 ac. lot (Lot 81) on Moser's Island at Glen Margaret, Halifax County. A Building Permit for the fish plant had been previously granted by the Building Inspector for the County, which decision was subsequently upheld by the Municipal Building Board of the County. The fish plant was to be used in connection with a fish ranching, processing and shipping operation, likely utilizing salmon and maybe tuna, and in conducting research on shellfish. The subject land and land in the immediate vicinity are unzoned, and the primary land use in the immediate area is residential. The lot is within the area covered by the Halifax Dartmouth Regional Development Plan but outside the Development Boundary. There is no Municipal Development Strategy in effect for this area. Section 5(1) of the Planning Act makes it necessary that a Regional Development Permit be obtained.

HELD - The appeal is allowed. The Regional Development Permit issued to Ocean Farmers is revoked.

The sole issue for the Board is whether the proposed development conforms to the Halifax Dartmouth Regional Development Plan. If it is to allow the appeal, the Board must satisfy itself that the issuing of the permit is in violation of the policies, goals, objectives and regulations of the Regional Plan. This includes the 17 criteria the Plan specifies the

Director is obliged to consider; all statutory requirements of the Department of Public Health, the Department of Environment and the Department of Highways; all municipal requirements; and whether the proposed development affects the arterial road and highway system as shown in the Regional Plan. The Appellants are "aggrieved" persons within the context of s. 7(1). The Director did not follow the suggested check list set out in the Waverley Ratepayers' Association decision before issuing the permit, and while he is under no legal obligation to follow it, he should. There is an onus on the Appellants to establish the decision of the Director is inconsistent with the Plan. A proposed development need not be "prohibited" to be "inconsistent" with the Plan when viewed as a whole. The Board accepts the uncontradicted expert testimony that the proposed plant would have an adverse effect on the value of vacant land on the shore near it, of two permanent dwellings nearby, and of all properties in the near vicinity. Of the 17 criteria the Director is required to examine, the Board is of the opinion the proposed development does not fully comply with 3 of these, namely #1, "Conformity of the proposed development with the policies and provisions of the Halifax-Dartmouth Regional Development Plan," #3, "Compatability with existing or proposed development in the adjacent area" and #14, "Impact upon natural environmental process of the proposed development upon the advice of the Department of the Environment." As to #1, an objective is to "foster and encourage stabilization of existing neighbourhoods". Instead of this, the fish plant would likely have a negative impact simply because the neighbourhood is basically a residential one. As to #3, again the adjacent area is mainly residential, and even if the plant were carefully and prudently operated, fish odours might well result. As to #14, it appears that no "advice" was actually given the Director, and there is a doubt as to whether all the requirements of the Dept. of Environment have been met. In the future the Director might well ask for information in writing on forms he prepares from the Depts. of Environment, Health and Transport that statutory requirements have been met. Additionally if the fish plant is an industrial use, this proposal does not meet the requirements of the Regional Plan for such uses. While the issuance of the Building Permit is not an issue before the Board, the arguments and evidence on this point cast in doubt the Building Inspector's decision. The proposed development also does not have the benefit of an exemption given to "uses directly related to the fishing industry" because that exemption does not apply to "uses for the processing of fish", which this use would be.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Statutes of Nova Scotia 1969, Chapter 16;

- and -

IN THE MATTER OF: A Regional Development Permit issued to Ocean Farmers Limited for the construction of a Fish Plant on Moser's Island Road, Glen Margaret, Halifax County, Nova Scotia.

- and -

IN THE MATTER OF: An appeal by Allan Shatford et al

BEFORE: R.H. BLOIS, Q.C., Chairman
DARRYL W. WILSON, C.A., LL.B., Member

COUNSEL: A.W. COX, Q.C., and FREDERICK P. CROOKS, LL.B., for the Appellants

WILLIAM M. WILSON, LL.B., for the Director of Community Planning

TERRENCE R. COOPER, LL.B., for Ocean Farmers Limited

ROBERT G. CRAGG, LL.B., for the Municipality of the County of Halifax

DECISION

This is an appeal under Section 7(1) of the Planning Act Statutes of Nova Scotia 1969, c.16, by Allan Shatford, Dianne Shatford, Harold Connor, Dennis Connor, Peter Dorrington, Tom Guildford, Douglas Morash, Edith Morash, Ronald Morash, Ann Brimer, Janet LeBrun, G. Paul LeBrun, Donald J. Bain, Elsie L. Bain, John D. Watson, Douglas W. Allen, Hilda G. Allen, Byron Moser, Carol Moser, Gordon Gee and Joan Gee from the decision of the

Director of Community Planning for the Province of Nova Scotia made December 6, 1982 granting a Regional Development Permit to Ocean Farmers Limited for the development of a fish plant on land shown as Lot B1 on a plan of subdivision of lands of Byron Moser and Allan Shatford prepared by J. Forbes Thompson, N.S.L.S., dated November 8, 1978 and approved on April 6, 1979, the said land being situate on Moser's Island Road, Moser's Island, Glen Margaret, Halifax County, N.S.

FACTS:

Ocean Farmers Limited, hereinafter referred to as Ocean Farmers, made application on September 10, 1982 by Karen Westhaver, its President, for a Regional Development Permit for the purpose of establishing a fish plant on Lot B1, a vacant parcel of land containing 2.26 acres more or less situate on Moser's Island Road, Moser's Island, Glen Margaret, Halifax County, Nova Scotia. The subject lot has a frontage of 150' on the road and extends from the road in a southwesterly direction to the salt water known as Moser's Cove. The lot has a water frontage of approximately 235'. The subject lot is bounded on the north by Lot B2 and on the south by Lot A2 both of which are vacant. The nearest dwelling is located on lands owned by one of the Appellants, Donald Bain, situate immediately north of Lot B2 on the subdivision plan showing the subject lot. The Bain lot also extends from the Moser's Island Road to Moser's Cove.

On December 6, 1982 the Director of Community Planning for the Province of Nova Scotia, issued a Regional Development Permit to Ocean Farmers, a copy of which was filed as Exhibit S-7 which reads as follows:

> "Permission is hereby granted to Ocean Farmers of Indian Harbour, RR #1 Tantallon, to proceed with the following development: Construction of a fish plant on Lot B-1, lands of Byron Moser and Allan Shatford, as per building permit application No. 61607, at Glen Margaret, in the County of Halifax. This permission is given pursuant to an application made on the 10th day of September, A.D., 1982, with application number 27919.
>
> This permit is subject to the following conditions:
>
> This permit expires six months from the date of issue and is subject to renewal pursuant to the provisions of the Regional Development Plan."

Ocean Farmers had received a Building Permit on November 29, 1982 for a fish plant on Lot B1 from the Municipal Building Inspector for the Municipality of the County of Halifax (Exhibit S-8).

Ocean Farmers proposed to establish a tuna ranching, processing and shipping operation on the subject site. The intention was to supply the Japanese Market with tuna. The proposed operation was to catch and maintain tuna in offshore pens near Dover in St. Margaret's Bay where they would be fed and fattened for slaughter in the fall. They would be slaughtered in the offshore pens and then they would be towed by boat to the proposed processing plant at the subject site.

At the plant, the tuna would be cleaned, have their heads and tails removed and individually packed in ice in boxes. The processed fish would be then taken from the subject site by truck to the Halifax International Airport for shipment by air to Japan.

The subject site slopes upwards from Moser's Island Road to a point about 200 feet from the shore of Moser's Back Cove and then slopes abruptly downward to the waters of the Cove.

The subject lot and land in the immediate vicinity is unzoned. The primary land use in the immediate area is residential with a combination of year-round dwellings, mobile homes and summer homes. There are two camp grounds, a plumbing business, and an auto repair business in the community of Glen Margaret, which includes Moser's Island, where the subject site is siutate.

Moser's Back Cove is a shallow protected inlet from the ocean and has only two outlets, one into Moser's Cove and one into Long Cove. The outlet into Long Cove is under a narrow bridge with limited clearance from the water. The outlet into Moser's Cove is navigable by small boats with a fairly narrow channel.

Moser's Island Road is a gravel road which connects with Highway Route #333, an older paved highway on the Mainland. Moser's Island is connected to the Mainland by a bridge located about 500 feet from the subject lot.

A Regional Development Permit is required for the construction of the proposed fish plant under the provisions of Halifax Dartmouth Regional Development Plan (S-4). The subject lot is within the area of the Development Region shown outlined in red on Map 1, Appendix "B" of the Regional Plan but is outside the Development Boundary shown on Map II Appendix "C" of the Regional Plan. There is no Municipal Planning Strategy (formerly known as a Municipal Development Plan) in effect for the subject area.

Section 5(1) of the Planning Act S.N.S. 1969 c. 16 makes it necessary to obtain a Regional Development Permit for the proposed fish plant. It reads as follows:

> " In an area where a regional development plan is in effect and no municipal development permit under Section 43 is required no one shall undertake a development without first obtaining a regional development permit unless such development is of a kind exempted under subsection (8)."

The subject land is not an area for which the exemption provisions of s.s.(8) of Section 5 apply.

The appellants' Notice of Appeal dated December 15, 1982 sets forth the following grounds of appeal:

> "1. The proposed development does not conform with the applicable regional development plan;
>
> 2. The proposed development is inconsistent with good planning principles;
>
> 3. The proposed development is inconsistent with the interests of the Municipality of the County of Halifax;
>
> 4. Such other grounds of appeal as may appear."

Issue For the Board's Determination

It is the opinion of the Board that the only relevant ground of appeal is ground number 1. The sole issue therefore is to determine whether the proposed development conforms to the Halifax Dartmouth Regional Development Plan.

The Board adopts and approves the following statement from the decision of the Provincial Planning Appeal Board dated October - , 1976 as found in Vol. 6 of the Provincial Planning Appeal Board Reports at p. 696:

> "The Board if it is to allow the Appeal, must satisfy itself that the issuing of the Regional Development Permit is in violation of the policies, goals, objectives and regulations of the Regional Plan. In determining whether or not to issue a Regional Development Permit, the Director is obliged to consider the 17 criteria set forth on page 50 of the Regional Development Plan. The Director must not issue a Regional Development Permit unless he is presented with evidence to his satisfaction that all statutory requirements of

> the Department of Public Health, the Department of Environment and the Department of Highways and all municipal requirements have been complied with under Section 28 of the Regional Plan. Furthermore, the Director under Section 29 must not issue a Regional Permit if the proposed development adversely affects the "arterial road and highway system as shown on Map III of the Regional Plan."

The hearing of the appeal commenced on March 21, 1983 and with the consent of Counsel for all parties was adjourned to May 10, 1983 because of the illness of Ronald Simpson, the Director of Community Planning. The hearing recommenced on May 10, 1983 and the Board heard four consecutive days of evidence from May 10, 1983 to May 13, 1983 inclusive. On May 13 the hearing by agreement of Counsel was adjourned to September 7, 1983. On September 7, 1983 at the request of Counsel for Ocean Farmers and with the consent of other Counsel, the hearing was adjourned to January 4, 1984. The Board heard further evidence on January 4 and 5 and concluded the hearing of the evidence on January 6, 1984.

Briefs were filed on behalf of the Appellants, the Director and Ocean Farmers. The last submission received by the Board was a response from the Appellants to the submissions made by Ocean Farmers and the Director. This response was received by the Board on March 1, 1984.

On May 10, 1983 opening statements were made by Counsel indicating in general terms what the various parties to the appeal hoped to prove.

Counsel for the Appellants tendered a number of documents for filing with the Board as exhibits. One of these (Exhibit S-6) was the decision of the Municipality's Municipal Building Board dated March 17, 1983 which upheld the decision of the Chief Building Inspector, Joseph Hefler in issuing a permit to Ocean Farmers.

Counsel for Ocean Farmers objected to the admissibility of this document based on the argument that it was irrelevant. The Board agreed to admit Exhibit S-6 because it considered the document had some relevance with respect to whether or not the Municipality's requirements were met. An appeal to the Trial Division of the Supreme Court of Nova Scotia from the Municipal Building Board's decision is pending.

Review of Evidence

Evidence on behalf of the Appellants was then presented. The first witness was one of the Appellants, Mrs. Hilda G. Allen, wife of Douglas W. Allen, who resides within 500' of the subject site on a lot 3/4 of an acre in size. Her property has an assessed value of $51,000.00 and lies on the south side of the Moser's Island Road to the east of the subject lot and east of the bridge between Moser's Island and the mainland. This property has frontage on the waters of Moser's Back Cove. She indicated that the subject lot was in an area containing a mixture of year-round and summer residences in a close knit community that was quiet and enjoyed such recreational activities as boating and swimming with the nearest commercial establishment being a mile away. She came to Moser's Island in 1957 to enjoy the country atmosphere. She was under the impression that the proposed fish plant would be similar to the one at Indian Harbour and would likely attract gulls. She described Indian Harbour as being a fishing community, unlike Glen Margaret, which she described as residential in nature.

Mrs. Allen expressed concern that a fishing plant on the subject site would cause contamination of water in the Cove and this would make swimming in the Cove undesirable. She also was concerned that there would be an increase in local traffic on Moser's Island Road including truck traffic. She felt that a fish plant would affect the saleability of her property and would also affect the stability of her neighborhood. She expressed the opinion that there were many undeveloped locations in St. Margarets Bay which would be more suitable for a fish plant.

On cross-examination Mrs. Allen admitted that she could not view the subject site from her property. She also agreed that the nearest commercial venture was Wambolt's Garage located on Moser's Island about 500-600' from subject site.

Another Appellant, Peter Dorrington, who resides on the northwest side of Route 333 at Glen Margaret about 700 feet from the intersection of Moser's Island Road and Route 333 next gave evidence. He indicated that his property is about 500 yards from the subject site. Mr. Dorrington's property lies between Route 333 and Moser's Back Cove. He purchased his property in 1966. He stated that he had not received any notification of the permit application for a fish plant prior to its issue. He stated he had some knowledge of the operation of the fish plant at Indian Harbour. He expressed his concern that a fish plant operation would result in fish deposits entering the water which in turn would attract sea gulls and possibly rodents. He also considered that a fish plant on the subject site would affect the saleability of his property. Had he known that a fish plant would be built, he would not have purchased his property. At the time Mr. Dorrington purchased his property it was zoned "General Building".

On cross-examination Mr. Dorrington admitted that he conducted a business on his property during the period 1974-78. Mr. Dorrington stated his concern that a fish plant on the subject site could have an adverse effect on his life style.

Byron Moser, another of the Appellants, was called by Counsel for the Appellants. He resides on Route 333 next to the Dorrington property and owns two large vacant lots, A1 and A2, shown on the subdivision plan filed as Exhibit S-20. Lot A-2 is contiguous to Lot B1, the subject lot. Lot A2 contains 3.91 acres and Lot A1 contains 2.46 acres and both of these lots extend from the Moser's Island Road to Moser's Cove.

Byron Moser has lived in the subject area all his life. The property on which his house is located is assessed for $61,500.00, Lot A1 for $25,000.00 and Lot A2 for $40,000.00. He described the Moser's Island area as residential and recreational in nature. He constructed his home in 1959. He expressed concern about odours coming from a fish plant which he thought would attract gulls. He stated that there are 14 homes on Moser's Island, 10 of which are summer homes and 4 are year-round residences.

Evidence was given by Allen Shatford, one of the Appellants, who resides on Moser's Island Road about 150 yards from the subject site. He is the owner of the vacant lot B2 lying between the property owned by Donald Bain and the subject property. He stated that the property where he resides is assessed for $59,500.00 and Lot B2 for $20,000.00. He is a former owner of the subject lot which he sold about 3 years ago to the predecessor in title of Ocean Farmers. He stated that the area where the subject lot is located is known as the "Head".

Mr. Shatford stated that he was familiar with Indian Harbour as he had lived there for 22 years. He described Indian

Harbour as a "fishing village" and Glen Margaret as a "bed-room community". He said there has never been a fish plant located in Glen Margaret in his time. He expressed his concern that a fish plant on the subject lot would make it more difficult to use the Back Cove because of boats coming to and from the fish plant. He also expressed concern that the saleability of his Lot B2 would be affected. Pollution to the water seemed to be his main concern along with heavy traffic.

Douglas W. Allen, husband of Hilda G. Allen and a resident of Moser's Island Road was the next witness called by Counsel for the Appellants. His property is bounded on one side by lands of Byron Moser and on the other side by lands of Lorna Vickers. Mr. Allen is retired. He emphasized the recreational value of water in this area which is his main reason for living there. He considered that a fish plant on the subject site would affect the enjoyment of his property and if the plant were constructed he would seriously think of leaving the area. He was concerned about the effect of fish material being flushed into the Cove from the plant. He had some experience with fish plants as he had supervised the construction of a fish plant at Petit de Gras and the firm with which he had been associated had designed the National Sea plant at Lunenburg. He considered the subject site to be inappropriate for a fish plant because the subject site is in an area which is residential in nature.

Donald J. Bain,an Appellant who is a retired employee of the C.B.C. and the owner of property where he resides on Moser's Island Road was the next witness called. He acquired his land on Moser's Island Road in 1971 from which he removed a cottage and built his present home. He has enjoyed boating all his lifetime. He had visited the Indian Harbor fish plant in the fall of 1982 and had observed the process being carried on at that site. He said he could smell a pungent odour of fish,which in his words was "not that bad". He revisited the Indian Harbor site in December and took some photos of the Indian Harbor fish plant site. Photo filed as Exhibit S-33 shows the Indian Harbor fish plant with fishing nets piled up in front of the building. Another photo (S-36) taken from the wharf at the Indian Harbor fish plant shows tuna scrap in the water.

Mr. Bain said he is fearful of pollution from the proposed fish plant which would be located on land separated from his lot by only 150'. He expressed concern about pollution to the water and about smells and noise coming from the proposed fish plant. His property is assessed at $50,000.00. On cross-examination he indicated that the vacant lot lying between his property and the subject site is presently uncleared and is covered by spruce. Mr. Bain stated that his land is upwind from the subject site. He admitted on cross-examination that his land was unzoned in 1971 when he purchased it.

Mrs. Dianne Shatford, the wife of Allan Shatford, another Appellant, was called by Counsel for the Appellants. She had been involved in the circulation of a petition in the Glen Margaret area filed as Ex. S-37. She and some other residents of Glen Margaret circulated the petition which has 230 signatures of persons opposed to the granting of the regional permit and the municipal permit to Ocean Farmers. Mrs. Shatford expressed concern about the effect of a fish plant on swimming in the Cove and also about the safety of children using the Cove.

Seymour J. Ettman, a full-time resident of Lower Seabright since 1973 and a summer resident since 1947, was called on behalf of the Appellants. He had directed the Janel fish plant at Indian Harbour until 1981 and was a consultant to that firm until he retired in 1982. After some discussion by Counsel, Mr. Ettman withdrew as a witness on the understanding that Counsel for the Appellants could later recall him as a rebuttal witness.

The next witness for the Appellants was Robert L. Stailing, a real estate broker and appraiser with 40 years experience in the real estate business, mainly in the Halifax area but also in Nova Scotia, outside the Halifax area. Mr. Stailing prepared a report filed as S-51. Mr. Stailing had inspected the subject site on several occasions and was generally familiar with Moser's Back Cove and the Glen Margaret area. He also is familiar with the Janel fish plant at Indian Harbour, having appraised that property 10 years previously. Attached to his report is the Statutory Declaration of S. Jay Ettman sworn to on February 11, 1983. The Statutory Declaration of Mr. Ettman clearly outlines the operation of Janel Fisheries Ltd. in its tuna ranching and shipping process which is seasonal activity, starting in mid-April and ending in December.

Mr. Stailing's report states that he did not carry out any formal appraisals or inspections of properties in connection with the preparation of his report. Mr. Stailing's report is based on his understanding that Ocean Farmers will build a wharf

75' x 13' from the subject site and erect a 50' x 30' building adjacent to the wharf to facilitate the landing and cleaning of tuna and the storage and handling of bait and nets. He states that the subject site is unzoned. He states that the highest and best use of the land which fronts on the shore of Moser's Island is for residential purposes. Mr. Stailing's conclusion as stated in his report is that "a fish plant operation would have an immediate adverse effect on the value of vacant land on the shores of Moser's Island Back Cove". He also states that he has "serious doubts of the saleability of any of the shore lots if the fish plant is erected and operational". His report concludes by stating that; "Respecting the permanent dwellings of Donald Bain and Allan Shatford which are within a few hundred feet of the proposed site, I am of the opinion that these properties will suffer a loss in value if the project is permitted to proceed. Installation of such a business entity in the midst of a quiet residential area will probably have a harmful effect on all of the properties in the near vicinity".

On cross examination, Mr. Stailing stated he based his opinion partly on his knowledge of the Janel fish plant at Indian Harbour. Mr. Stailing admitted that he had not spoken to Miss Karen Westhaver, the President of Ocean Farmers to obtain information from her as to the precise type of fish plant operation proposed for the subject site.

Maurice Lloyd, a professional engineer and planner, was called as an expert witness by the Appellants. Mr. Lloyd is a member of the Canadian Institute of Planners and is a registered professional engineer. He is a former Director of Community Planning for the Province of Nova Scotia. For the past two years Mr. Lloyd has been employed as Manager, Atlantic Region,of Underwood McClellan Ltd., a consulting engineering firm. Mr. Lloyd has been involved as a consultant to the Minister of Municipal Affairs during the preparation of the Halifax Dartmouth Regional Development Plan. Mr. Lloyd stated he was familiar with the Municipality's Official Town Plan filed as Exhibit S-5 and also with the Municipality's Building and Zoning By-laws.

Mr. Lloyd prepared a planning report dated March 18, 1983 filed as Exhibit S-54. Prior to preparing his report Mr. Lloyd had met with Mr. Crooks, one of the Appellants' Counsel and also with Mr. Simpson, the present Provincial Director of Planning and had reviewed Mr. Simpson's file. He had also attended the hearing before the Municipal Building Board respecting the appeal to that Board from the decision of the Building Inspector in issuing a Municipal Building Permit to Ocean Farmers.

Attached to Mr. Lloyd's report are a number of maps including Map 3 which shows existing land uses in an area bounded on the north by Saddler's Point and on the south by Boutilier's Cove. This area includes the subject site. The primary land use in the area shown on Map 3 is residential with a mixture of permanent year-round homes, some mobile homes and some summer homes. Other land uses in this area are two camp grounds, a seasonal take-out facility, a plumbing business, an auto repair business and community uses including churches. The nearest industrial use is an electronics assembly plant located on the south side of Route 333 at Hackett's Cove. When questioned as to why he selected the area shown on Map 3 of his report, Mr. Lloyd stated that he considered this area to reasonably constitute a "community".

Mr. Lloyd was of the opinion that the use of the subject site for a fish plant would constitute an industrial use related to the fishery. He considered that there were three sections of the Regional Plan which are particularly relevant to the issue in this case, namely Section 4 containing objectives and policies relating to industrial and service growth, Section 12 which establishes guidelines for issuing Regional Development Permits and Section 28 which sets out general controls respecting the issuing of Regional Development Permits.

His report concludes with the following statement: "Given the Regional Development Plan policy conflicts, the lack of any approval from the Department of the Environment, the conflict with Municipal Development Policies and the Municipal Zoning By-law, the Regional Development Permit should not be approved".

Mr. Lloyd, on cross-examination stated that the standard procedure in effect when he was Director of Planning on applications for regional permits was to accept the issue of a municipal building permit as evidence that municipal requirements were met.

Mr. Lloyd pointed out that while the subject lot is unzoned, the zoning by-law of the municipality does have provisions which apply to the subject site; e.g. the industrial provisions of the by-law. Section 49B of the Municipality's Zoning By-law states that:

> "Notwithstanding any other provisions of this by-law, no person shall erect, alter, repair, maintain, or use any building in whole or in part or use any land for an industrial enterprise except in an I-1, I-2 or IP Zone."

Section 49D of the Zoning By-law states that:

> "The Provisions of Section 49B shall not apply to an agricultural, fishing or forest use."

Mr. Lloyd appeared to be surprised when on cross-examination by Counsel for the Director, he indicated he was not familiar with the McRae's fish plant located at Paul's Point near Boutilier's Cove. He had not taken this plant into consideration when he had prepared his report filed as S-54. In fact, Mr. Lloyd had issued a Regional Development Permit for the construction of the McRae fish plant on October 26, 1978 when he occupied the position of Director of Community Planning for the Province of Nova Scotia.

The hearing was adjourned between May 12 and May 19, 1983. On May 19, 1983 Mr. Lloyd admitted that the McRae plant was in an area where the land use patterns are similar to those existing in the Glen Margaret area. He did distinguish the Moser's Island subject site from the Paul's Point site. The McRae plant is situate at the end of a gravel road whereas the subject site is on a road in the middle of a residential area. He also stated that McRae's plant handles salt fish while the proposed fish plant would process fresh fish.

Mr. Lloyd stated that once the municipality has an approved Land Use By-law in effect, a Regional Development Permit is unnecessary.

Mr. Lloyd in response to a question from Counsel for the Appellants stated that one of the objectives of the regional plan is the stabilization of existing neighborhoods.

Evidence on behalf of Ocean Farmers was given by its President, Karen Westhaver. She holds a B.Sc. degree in biology and had previously been employed by Janel Fisheries of Indian Harbour. She stated that her Company had purchased the subject Lot (B1) for the price of $62,500.00 from Terry Tremayne. A photocopy of the deed to Ocean Farmers dated November 29, 1982 was filed as Exhibit S-64. This deed reserved to the owners of Lot B2 a right of way over a portion of B1 and granted to the owner of Lot B1 a right of way over a portion of Lot B2 so as to create a mutual right of way 20' in width and 400' in depth on the boundary between Lots B1 and B2.

Miss Westhaver checked the zoning of the subject site prior to purchasing the lot and ascertained that the lot was unzoned. She made application for a building permit from the municipality to construct a wood frame fish plant (50' x 30' and 25' high) on Lot B1. This application was received by the Building Inspector on September 10, 1982 and on the same date she applied for a Regional Development Permit for a "fish plant". The municipality issued a Building Permit on November 26, 1982 and the Director of Community Planning issued a Regional Permit on December 6, 1982. Miss Westhaver stated that she had in mind a plant to be designed for fresh fish and not for salt fish. She also stated she planned to have a 70' long wharf extend from Lot B1.

Miss Westhaver explained her intentions of purchasing small salmon raised in a hatchery in Liverpool which are brought to pens presently located in salt water at East Dover where the fish must adjust from fresh to salt water conditions. The fish remain in pens for 18 months. When orders are received the fish are raised and bled and brought from the holding pen area to Moser's Island by truck where they would be washed at the proposed plant. The harvesting normally takes place between June and November.

Miss Westhaver stated that her plans included a research project on shell fish at the Moser's Island site.

She said she did not plan to use the waters off Moser's

Island for the fish raising process. She obtained rights from the Department of Transport to use a site at East Dover.

Miss Westhaver identified Ex. S-65 as being a photocopy of a petition signed by over a hundred residents of the St. Margaret's Bay area who were in favor of the issue of a permit to Ocean Farmers "to construct a fish plant for tuna ranching at Glen Margaret". The persons who signed the petition resided at various places including Glen Haven, Glen Margaret, Seabright, Hackett's Cove, Indian Harbour, Upper Tantallon and French Village.

Miss Westhaver identified Ex. S-69 which is a letter from Environment Canada, Dartmouth to her dated December 20, 1982 which, after referring to her plans submitted to MOT for approval for a proposed wharf at Moser's Cove, stated in part that, "It is the combined opinion of these agencies [Environment Canada and the Dept. of Fisheries and Oceans] that your project is not expected to have a significant effect on the immediate environment".

Miss Westhaver also identified a letter (Ex. S-70) dated November 29, 1982 from the Municipality's Chief Building Inspector to her referring to a report received from the Atlantic Health Unit. This letter states in part that the Atlantic Health Unit report "states that the existing [disposal] system is suitable for the proposed construction".

Miss Westhaver referred to an Admiralty Chart showing the St. Margaret's Bay area (Ex. S-71) on which she had placed blue headed pins marking the locations of 61 commercial establishments in the St. Margaret's Bay area between Head Harbour and Peggy's Cove. Each blue pin is numbered and the names of these businesses are listed in Ex. S-72. Photos of these businesses are contained in Ex. S-73. Photo #23 in Ex. S-73 shows Wambolt's Garage at

Glen Margaret which is the nearest commercial establishment to the subject site. This garage is located about 1/2 mile from the subject site by road and 300' across the water.

Miss Westhaver referred to the Statutory Declaration of Mr. Ettman filed as Ex. S-62 and stated that Mr. Ettman was far afield in his declaration. She stated that in her nine year's experience she has never seen flies around fresh fish.

On cross-examination by Counsel for the Appellants, Miss Westhaver stated that the name Ocean Farmers was chosen because the Company is involved in the farming of fish in the ocean but not in the catching of fish. She said that her Company had carried on a tuna operation in 1983 but had experienced a financial set back in that year because of the lack of tuna fish as the Company only harvested 17 fish.

When asked if the tuna fish return to the St. Margaret's Bay area would she again be interested in a tuna operation, she stated that she preferred to invest in something more certian but she did not rule out the possibility of going into tuna ranching if conditions improve. She said she expects to be in business for 25 years and made the decision in September or October to go out of the tuna ranching business.

When questioned on cross-examination about the need for a 70' wharf, Miss Westhaver stated that a boat from East Dover would come to the wharf bringing salmon from the pens. Also boats bringing mussels would come to her wharf. She said she didn't know what would take place in the future so she indicated that she had no precise idea what the wharf would be used for.

Miss Westhaver was clear on cross-examination that while she had abandoned the tuna operation she reserved her right to resume this type of operation in the future.

Miss Westhaver explained what the day to day activities would be at the subject site. She said that fish pellets in 55 lb. bags would be delivered to the site in a 5 ton truck about once a month. These bags would then be stored in the fish plant building. She would be involved in feeding the penned salmon twice daily. The building would have an office in it. The fresh fish would be brought to the plant in boxes containing ice, one fish to a box. After the fish arrive at the plant the ice would be removed and the fish repacked in boxes with ice. There would be a freezer in the plant where some fish would be stored to supply the frozen fish market. Salmon mesh nets would be stored in the plant. She indicated that the plant building would be used for other purposes including research. She stated that the fish plant could not be viewed from Moser's Island Road.

On cross-examination Miss Westhaver was substantially in agreement with the contents of Mr. S. Jay Ettman's Statutory Declaration (Ex. S-62) in which he outlined in considerable detail the nature of the tuna ranching and shipping operation carried on by Janel Fisheries Ltd. during the period 1973 to 1981 when Mr. Ettman was the President and owner of the company.

Extensive evidence was given by Ronald Simpson, the Provincial Director of Planning who is responsible for the issuing of Regional Development Permits. He stated that the subject lot is in an area requiring a Regional Development Permit. Mr. Simpson explained the procedure involved in the issuance of a Regional

Development Permit. Firstly the applicant is given an application form by the municipality for a Regional Development Permit at the time the municipality receives an application for a Municipal Building Permit and that application is filed with Mr. Simpson's office.

On the receipt of the application, Mr. Simpson checks to see if the land in question is within the Regional Development boundary and then checks to see if the requirements of the Halifax Dartmouth Regional Development Plan are met. He stated that he relies on the issue of a Municipal Building Permit to satisfy himself that all Municipal requirements have been met.

Mr. Simpson's evidence was to the effect that he had examined the application for Regional Development Permit by considering the application in relation to the requirements of the Regional Plan. He first of all determined that the subject lands were outside the development boundary which is shown outlined in black on Map II entitled "Urban Form Policy", which map is attached to the Regional Plan as Appendix "C".

Mr. Simpson indicated that he was satisfied that the proposed use of the subject land did conform to the provisions of the Regional Plan. He understood the application for a Regional Permit was one which if approved would permit the construction of a fish plant and wharf to be used in connection with a tuna ranching operation and with the possibility that a salmon operation would be included. He was not aware of any other proposed uses by the Applicant.

Mr. Simpson, on direct examination reviewed the applicable Sections of the Regional Plan and the 17 criteria set forth in

Section 12(B) of the Regional Plan by which he is required to determine whether or not to issue a Regional Development Permit. He said that in his opinion the application met all 17 criteria but criteria #3 "compatibility with existing or proposed developmet in the adjacent area" gave him some concern.

Mr. Simpson expressed the opinion that the proposed use of the subject site by Ocean Farmers constituted a commercial rather than an industrial use.

Mr. Simpson stated that the H.D.R. Development Plan area was the only area in Nova Scotia where a Regional Development Plan is in effect. He stated that in 1982 he issued 615 Regional Development Permits and spent about 5% of his time on Regional Permit applications. He did not visit the subject site before issuing the permit but did so afterwards. At the time he issued the permit he was aware that the subject site was in an area where there are a number of summer cottages. He pointed out that he was familiar with the area, having lived in Boutilier's Point for 5 years.

Mr. Simpson pointed out that fishing takes place virtually all along the coast of Nova Scotia. When asked on cross-examination to define a "fish processing plant" he assumed that it was an operation which goes beyond basic cleaning and salting of fish such as canning. When asked if he lived in a residentially used area would he be concerned if a fish plant was constructed next door, replied that he would be concerned.

On further cross-examination, Mr. Simpson when asked what existing development the proposed fish plant was compatible with, replied that he thought it was compatible with the historical uses in the area. Also on cross-examination Mr. Simpson indicated that the proposed fish plant was compatible with the uses of properties shown on the aerial photo filed as Ex. S-9.

Mr. Simpson stated on cross-examination that he did not rely solely on the issue of the Municipal Building Permit to satisfy himself that Municipal Regulations and By-laws were met. He indicated that the issue of a Municipal Building permit signified that municipal requirements were met but he does check on zoning before issuing a Regional Permit. He found on inquiry that subject lot was unzoned.

When asked on cross-examination what steps he took to satisfy himself that the Department of Environment requirements were met he replied that Mr. Cristian of his staff had spoken to Mr. Jones and Mr. Brodie of the Department of Environment and they were not aware at that time of the proposed development although they subsequently knew. Mr. Simpson stated that the Department of Environment did not appear to be concerned about the proposed development. He therefore concluded that since the Department of Environment were not concerned that their requirements had been met. Mr. Simpson stated that a Regional Development Plan sets forth Provincial Policy as to land use in a particular region. He said a Regional Plan is intended to provide a broad frame-work of land uses until municipal plans (municipal planning strategies) and zoning laws (land use by-laws) are in place.

Mr. Simpson said that one could argue that the proposed land use is exempt from Regional Permit requirements but he thought it better to require a permit application because of the fact that there will be some processing involved. He spent about one hour on the application before issuing the permit. Mr. Simpson agreed that a basic planning principle is that industrial and related uses are not compatible with residential uses. He stated that he had not examined the Municipality's "Official Town Plan" in connection with the application in question.

Mr. Simpson after being referred to Goal #6 on Page 34 of the Regional Plan which reads as follows:

> "To have development which imparts a strong sense of community and respect for the natural environment,"

was asked if the subject proposal meets this goal, answered that he doesn't know.

Mr. Simpson stated that there is no fixed procedure for him to follow in processing Regional Development Plan Permit Applications.

Evidence was given by Frederick N. Brodie called by the Appellants. Mr. Brodie is an Environmental Engineer employed by the Nova Scotia Department of the Environment. One of his major responsibilities is the review of Industrial Permit Applications. He stated that he had received two applications from Ocean Farmers, the first being in April of 1983 respecting a proposed tuna and salmon operation and the second on January 4, 1984 respecting a salmon operation and three types of shell fish. He was asked if his Department had advised that no permit is required and his answer was "no". When asked under what Statute a permit would be required, he replied; "The Environmental Protection Act". He specifically referred to Sections 23 and 28.

Mr. Brodie's first contact with Ocean Farmers was on January 26, 1982 when he talked to Miss Westhaver. He met with Miss Westhaver on January 26, 1982 and advised her to make application to his Department for a permit on a form he provided. A copy of this form was filed as Exhibit S-79. Mr. Brodie stated that the application form was submitted to him by Miss Westhaver but he had not further processed the application because of insufficient information being supplied. When asked what permit did he issue for the Janel Plant Mr. Brodie stated, "none" and when asked why? replied that there probably was no public outcry. He estimated that less than 20% of existing fish plants have permits.

On cross-examination by Counsel for the Director, Mr. Brodie stated that he doesn't know of any requirements of the Environmental Protection Act not being met.

The final witness to be called was Derrill Hynick, Chief of Industrial Waste Management, Department of Environment, Province of Nova Scotia. Mr. Hynick is a Civil Engineer to whom Mr. Brodie reports. He indicated that there are no formal procedures in place between the Department of Municipal Affairs and his Department but there is an open dialogue. He indicated Mr. Jones of his Department had some contact with Department of Municipal Affairs but that Mr. Jones had no authority to speak for his Department on this matter. He said Mr. Jones is a Policy Advisor who is involved with water management.

Although the Appellants' Notice of Appeal contained four grounds of appeal, only the first one is relevant to this appeal. It reads as follows:

> "The proposed development does not conform with the applicable regional development plan."

Thus, the sole issue to be determined by the Board is whether the proposed development conforms to the Halifax-Dartmouth

Regional Development (HDRD) Plan.

This appeal was brought pursuant to Section 7(1) of the Planning Act,c.16 Acts of N.S. 1969 which was the Statute in effect on December 6, 1982 when the Regional Development Permit in question was issued and was also in effect on December 15, 1982 when the Notice of Appeal was filed with the Board. c.16 of the Acts of 1969, the Planning Act, except Section 1 and Part 1X was subsequently repealed by Section 120 of the Planning Act, 1983, c.9.

Section 7(1) of the Planning Act of 1969 reads as follows:

> "Any person who considers himself aggrieved by the granting of a regional development permit, or the Director, may, within ten days from the granting of the permit, appeal to the board and that board may:
>
> (a) confirm the granting of the permit; or
>
> (b) allow the appeal by revoking the permit; or
>
> (c) order conditions to attach to the permit that in the opinion of the board are necessary to ensure conformity with the regional development plan; or
>
> (d) vary or revoke any conditions attached to the permit under subsection (5) of Section 5."

The Board is satisfied that those Appellants who gave evidence at the hearing are "aggrieved" persons within the context of Section 7(1) of the 1969 Planning Act. At the commencement of the hearing,Counsel for the Director, the developer (Ocean Farmers) and the Municipality of the County of Halifax all indicated that they had no objections to the regularity of the proceedings leading to the hearing. The Board therefore assumed jurisdiction to hear the appeal on the merits.

The Board in order to determine the issue in this appeal

or a similar one so that each application receives the proper scrutiny by the Director to ensure that when he issues a permit it is in compliance with the H.D.R.D. Plan. The Board considers it appropriate to quote further from the Waverley Case at Pages 696 and 697 of Vol. 6 of the Provincial Planning Appeal Board Reports concerning that Board's suggestions for a procedural check list as follows:

> "------the Board therefore suggests that a procedural check list for the granting of Regional Development Permits under the Halifax-Dartmouth Regional Development Plan be set up along the following lines:
>
> (1) A check should first be made to determine whether or not the lands in question are within the "Planning Region" as outlined in red on Map I of the Regional Plan;
>
> (2) Reference should then be made to the general controls section of the Regional Plan (Regulations 28 - 32).
>
> At this point the Director should receive satisfactory evidence from the Department of Public Health, Department of Environment and the Department of Highways that the proposed development has complied with their requirements. The Director should also receive from the Municipal unit involved evidence indicating that the proposed development has complied with all their municipal requirements. A check should be done on Map II, Appendix "C" and a check done on Map II, Appendix "D" to determine whether or not the development offends the seven "Regional Park" designations and/or the proposed Transportation Network System.
>
> (3) Next, one should consider whether or not the lands in question are within or without the development boundary as defined by the Regional Plan.
>
> (4) A consideration of those portions of the Regional Development Plan dealing with lands that are situate within the development boundary (Sections 21 - 27) as the case may be, should then be made.
>
> (5) The development in question should be checked

> for conformity with the policies, objectives, goals and regulations of the Regional Plan. At this state, all of the 17 criteria set forth in Section 12(B) of the Regional Plan must be used by the Director in determining whether or not to issue a Regional Development Permit.
>
> (6) Finally, the Director should pay particular attention to the provisions of the General Controls set out in Sections 28 and 29 of the Regulations in the Regional Plan."

The H.D.R.D. Plan was prepared by the Minister of Municipal Affairs under the provisions of Section 4 of the Planning Act, Statutes of Nova Scotia, 1969, c.16 and was approved by the Governor in Council on April 24, 1975. The H.D.R.D. Plan consists of three parts (1) Goals (2) Objectives and Policies (3) Control Regulations and also Appendices A, B, C and D. Appendix "A" is a form of Regional Development Permit, Appendix B is Map I showing the Planning Region outlined in red, Appendix C is an Urban Form Policy Map II showing inter alia the Development Boundary and Appendix D is Map III showing a Proposed Transportation Network.

S.S.(3) of Section 4 of the Planning Act of 1969 sets forth what is required in a Regional Development Plan as follows:

> "A regional development plan shall contain:
>
> (a) a statement of policies for the orderly economic and physical development of the region including policy with respect to
>
> (i) major industrial and commercial development;
>
> (ii) the development and management of resources;
>
> (iii) the regional transportation system;
>
> (v) regional educational, health and recreational facilities;
>
> (b) a program for co-ordinating and staging development and public expenditures in the region;

(c) provisions, including regulations controlling the use of lands, buildings and structures, necessary for implementing regional policies, and co-ordinating the development of municipalities in the region;

(d) such other matters as, in the opinion of the Minister, affect or may affect the orderly economic and physical development of the region."

S.S.(7) of Section 5 of the Planning Act, Statutes of Nova Scotia c.16 states that "no development permit shall be issued inconsistent with the Regional Development Plan". The Board's duty then in this case is to determine whether or not the permit issued by the Director to Ocean Farmers was issued "inconsistent with the regional development plan".

The board is of the opinion that there is an onus on the Appellants to establish that the decision of the Director to issue the permit in question is inconsistent with the Regional Development Plan. The Board is of the opinion that a Regional Development Plan by its nature is quite different in terms of detail from a Municipal Planning Strategy (MPS) known as a Municipal Development Plan (MDP) under the 1969 Planning Act. A regional plan by virtue of S.S.(3) of Section 4 of the 1969 Planning Act is a document containing "a statement of policies for the orderly economic and physical development of the region ----". A M.D.P. is a plan, which under the provisions of S.S.(3) of Section 13 of the 1969 Planning Act, must include statements of policy with respect to matters such as "the objectives of the municipality for its future development" and "the use of lands in the municipality" and "any other matter related to the physical, social or economic development of the municipality".

Counsel for the Director in his written submission states at Page 8 "-----that many of the broad bush policy considerations enumerated within the Regional Development Plan have application only when a development attains a regional significance. It is for this reason perhaps that as a control document developments are not permitted only when they are prohibited directly by the Plan". He goes on to say in para #10 of his submission that the onus is on the Appellants to show that the proposed development is "prohibited" by the provisions of the Regional Development Plan and that it is inconsistent with the policies and regulations of the Plan. While the Board agrees that there is an onus on the Appellants to show that the proposed development is inconsistent with the Plan it does not agree that there is an additional onus on the Appellants to show that the proposed development is "prohibited" by the provisions of the Plan. In the opinion of the Board a proposed development may not be actually "prohibited" by the Plan but may nevertheless be "inconsistent" with the Plan when a proposal is examined in the light of the Plan as a whole.

From the evidence and from the Board's visual inspection of the subject site and the lands in the immediate neighborhood of the subject site, that is, the lands on Moser's Island, the Board finds as matters of fact that the subject site (Lot B1) is an unzoned vacant parcel of land containing 2.26 acres ± situate on Moser's Island bounded on the southwest by the waters of Moser's Cove, on the northeast by Moser's Island Road, on the north by a 1.96 acre ± vacant parcel of land known as Lot B2 and on the south by a vacant parcel of land known as Lot A2 containing 3.91 acres ±. Moser's Island is a relatively small island in St. Margaret's Bay which is accessed by means of a bridge and a narrow gravel road which joins Route #333, a paved provincial highway which follows the eastern shore of St. Margaret's Bay from Upper Tantallon to Shad Bay.

Moser's Island is a sparsely populated area containing a mixture of summer and year-round homes. The only business located on Moser's Island is Wambolt's Garage. Moser's Island is unzoned and the general land use on the island is residential.

While Moser's Island would appear to constitute a small neighborhood, it appears to form part of a larger neighborhood comprising the Village of Glen Margaret.

Although Moser's Island is unzoned, the present uses are clearly residential aside from Wambolt's Garage which is operated by its proprietor whose year-round home is in close proximity to the garage.

The Board accepts the uncontradicted expert testimony of Mr. Robert L. Stailing, a real estate broker of long standing, that the construction and use of the proposed plant would have an adverse effect on the value of vacant land on the shores of Moser's Back Cove. The Board also accepts Mr. Stailing's evidence that the Donald Bain and Allan Shatford properties which have permanent dwellings "would suffer a loss in value if the project is permitted to proceed" and his further opinion that the proposed development in a "quiet residential area will probably have a harmful effect on all of the properties in the near vicinity". Mr. Stailing did not carry out any formal appraisal reports and therefore he did not quantify the loss in values which would result.

Counsel for the Appellants in his written submission to the Board referred to a considerable number of decisions made by the Provincial Planning Appeal Board and this Board relating to zoning appeals. While these cases contain useful guidelines as to what does or does not constitute good planning, they are not really helpful in the Board's determination of whether the proposed development is inconsistent with H.D.R. Development Plan.

The determination which the Board must make in zoning appeal cases is whether or not a particular rezoning decision was for the protection of the best interests of the Municipality or where a M.P.S. is in effect, whether or not the intent of the M.P.S. was carried out. The determination which the Board must make in an appeal against the decision of the Provincial Director of Planning in the issuing of a Regional Development Permit must be made on the basis of whether the issuing of the Regional Development Permit was or was not inconsistent with the Regional Development Plan.

There is no doubt that the Regional Director when he issued the permit to Ocean Farmers on December 6, 1982 did so on the basis that he had been presented with evidence "to his satisfaction" pursuant to Section 28 of the Regional Plan that all statutory requirements of the Departments of Public Health, Environment and Highways (Transportation) and all the requirements of the Municipality of the County of Halifax had been complied with. Since The Planning Act, c.16 Statutes of Nova Scotia 1969 makes provision in s.s.(1) of Section 7 for an appeal to the Board by persons who consider themselves aggrieved by the Director's decision, the Board if it is to confirm the Director'd decision must determine that the granting of the permit was consistent with the Regional Plan.

In order for the Board to invoke the provisions of Clauses (b) (c) or (d) of s.s.(1) of Section 7, quoted on Page 26 of this decision, the Board must find from the evidence and the examination of the Regional Plan that the proposed development is inconsistent with the Regional Plan. s.s.(7) of Section 5 clearly provides that "no development permit shall be issued inconsistent with the regional development plan". In order therefore for the Board to confirm the granting of a Regional Development Permit it must not only find that the Director had evidence to his satisfaction that all statutory requirements of the Department of Health, Environment and Transportation had been complied with and all municipal requirements had been met but that these requirements had in fact been complied with.

The Board has examined the proposed development in relation to the 17 criteria set forth in Section 12(B) of the Regional Development Plan, which the Director is required to use in his determination as to whether or not to issue a Regional Development Permit. Of the 17 criteria the Board is of the opinion that the proposed development does not fully comply with 3 of these criteria, namely #1, "Conformity of the proposed development with the policies and provisions of the Halifax-Dartmouth Regional Development Plan", #3, "Compatibility with existing or proposed development in the adjacent area" and #14, "Impact upon natural environmental process of the proposed development upon the advice of the Department of the Environment".

Each of these three criteria will be examined in relation to the proposed development. Firstly, criteria #1 provides that the proposed development must conform to the policies and provisions of the Regional Plan. The Regional Plan sets out the various objectives and policies "intended to promote the orderly economic and physical development of the Region". One of the objectives of the Regional Plan is set forth in Section 1(A) and it reads as follows:

> "To provide a framework for development that will encourage the orderly expansion of the Region, control the urban form so as to optimize public expenditures, foster and encourage stabilization of existing neighbourhoods, and maintain a high quality urban environment."

One portion of this objective is to "foster and encourage stabilization of existing neighborhoods". In the opinion of the Board the establishment of a fish plant on the subject site does not foster and encourage the stabilization of the existing neighborhood in which the subject site is located. This is so, whether the neighborhood is considered to be the land comprising all of Moser's Island or the larger neighborhood consisting of the Community of Glen Margaret. Not only does the establishment of a fish plant not foster and encourage stabilization of the neighborhood but it would likely have a negative impact on the neighborhood simply because the neighborhood is basically a residential one although unzoned as such. From the evidence it appears that the existing Moser's Island neighborhood and the greater portion of the larger Glen Margaret community is residential in nature. A fish plant such as the one proposed might well tend to destabilize the neighborhood as it would devalue existing residentially developed properties as well as the vacant lands on Moser's Island and in the neighborhood of the subject site and this could result in some present residents moving to other neighborhoods and might discourage new construction of dwellings either of the permanent or summer cottage variety.

Secondly, the proposed development must be compatible with the existing or proposed development in the adjacent area by virtue of criteria #3. In the opinion of the Board the adjacent area consists of Moser's Island which for the exception of Wambolt's Garage is entirely residential in terms of existing uses. Even if the adjacent area includes the Community of Glen Margaret it is mainly residential in nature. There are no industrial uses in this Community and the commercial uses are relatively few in number and appear to serve local needs, other than the two camp grounds. In the opinion of the Board a fish plant is a type of use which is not compatible with a residential environment. Although the evidence presented to the Board by Miss Westhaver concerning the use of her proposed fish plant would indicate that the plant would likely be operated in a careful and prudent manner and would not involve the handling of salt fish, nevertheless a plant involved in the processing of fish is a type of operation by its very nature might well result in some fish odours being generated. In the opinion of the Board the concerns expressed by the Appellants have some basis as many of the witnesses who appeared on behalf of the Appellants had some knowledge of the fish plant operation of the Janel Plant in Indian Harbour and while the proposed plant is not intended to operate in the same manner as the Janel Plant, they are similar in that they are both fish processing plants.

Thirdly, criteria #14 indicates that the Director must consider the impact of the proposed fish plant on the natural environmental process "upon the advice of the Department of Environment". From the evidence adduced it appears that no "advice" was actually given to the Director concerning the impact of the proposed development on the natural environment. The evidence of Mr. Frederick Brodie, an Environmental Engineer, employed by the Nova Scotia Department of the Environment clearly indicates that he requested Miss Westhaver to file an application on behalf of Ocean Farmers for a permit and an application was in fact made but lacked sufficient information for the processing of the application to be completed. In fact two applications for a permit had been made, one in April of 1983 and one on January 4, 1984. On the other hand, Mr. Brodie on cross-examination stated that he did not know of any requirements of the Environmental Protection Act which were not met. Mr. Brodie, when asked if his Department had given any advice that no permit was required, stated that no such advice had been given. There is certainly a doubt as to whether all of the requirements of the Dept. of Environment have been met. It would appear to the Board that the Director might prepare a suitable form which could be submitted to the Department of Environment as well as the Departments of Health and Transportation advising the Director in writing whether or not all statutory requirements of these three Departments had been met. It is noteworthy that when the Director issued the permit in question on December 6, 1982, no application had at that time been made to the Department of Environment and it is therefore questionable whether or not the Department of Environment had sufficient information on which to advise whether or not its requirements had been met.

The Regional Plan makes provision for major industrial and service areas inside the development boundary but specifically permits in Section 4(B) industrial parks having a minimum area of 100 acres to locate outside the development boundary. It also permits under Section 4(B) an industrial use on a lot outside the development boundary "if the lot has a minimum size of five acres and a minimum road frontage of 300 feet ----". Assuming that the proposed fish plant development is an industrial use it would not qualify under the provision of Section 4(B). Section 2(B) of the Regional Plan makes provision for the issue of development permits for industrial purposes "where they are located ---- for particular locational considerations such as salt water access or mineral deposits".

The Board agrees with the submission of the Appellants that "the authorization of a fish processing and shipping plant in a rural, residential and recreational area would not conform with the policies of the Plan. There are no particular locational needs for the proposed plant. True, it benefits from salt water access, but it does not need salt water access at this particular location".

It is the opinion of the Board that the Appellants have discharged the onus on them of showing that the issuing of the Regional Development Permit to Ocean Farmers to permit the construction of a fish plant is inconsistent with the Halifax Dartmouth Regional Development Plan for the reasons already given.

In the memorandum filed on behalf of the Appellants, argument is made that the proposed development should not be permitted by virtue of the provisions of the Municipality's Building By-law (Ex. S-11), the Municipality's Zoning By-law (Ex. S-12) and the Municipality's Official Town Plan (Ex. S-5). All of these documents were in effect at all relevant times. The issue before the Board however relates to the Director's decision in granting a Regional Development Permit and not to the Building Inspector's decision to grant a Municipal Building Permit. However, the arguments raised by the Appellants based on the evidence and the Municipality's By-laws including the Official Town Plan cast in doubt the Building Inspector's decision to issue a permit to Ocean Farmers.

The Director of Community Planning cannot be expected to be thoroughly familiar with all of the By-laws and Official Town Plan of the Municipality when he reviews an application for a Regional Development Permit. However, where he does rely on the issue of a Municipal Building Permit as an indication of the compliance with all Municipal requirements he must on an appeal be prepared to justify his reliance on such permit if evidence is adduced by the Appellants that all Municipal requirements have not been met. In other words the initial onus or burden is on the Appellants but this onus shifts to the Director if the Appellants are able to reasonably show that the Municipal requirements have not been complied with.

It appears to the Board that there is no doubt that a Regional Development Permit is required for the type of development proposed by Ocean Farmers. By prescription made by the Minister of Municipal Affairs pursuant to s.s.(8) of Section 5 of the Planning Act, Stats. N.S. 1969, c.16, certain listed developments are exempted from a Regional Development Permit for the Halifax Dartmouth Metropolitan Region, except regional parks and areas forming part of the arterial road and highway system in the H.D. Metropolitan Regional Development Plan. These exemptions include #18 which reads as follows:

"Uses directly related to the fishing industry but not including uses for the processing of fish."

In the Board's opinion the proposed development is one which contemplates the "processing of fish" and therefore does not come within the terms of the exemption.

The Board therefore allows the appeal and revokes the permit issued by the Director to Ocean Farmers.

An order will issue accordingly.

DATED at HALIFAX, in the County of Halifax and Province of Nova Scotia this 6th day of July, A.D. 1984.

R H Blair

Daryl Wilson

MEMBERS OF THE MUNICIPAL BOARD

A.T.C. Properties Ltd. v. City of Halifax (Citadel Motors property)

PLANNING--CONTRACT ZONING--REFUSAL TO APPROVE DEVELOPMENT AGREEMENT FOR MIXED RESIDENTIAL/COMMERCIAL DEVELOPMENT--RIGHT TO PARTICIPATE--WHETHER REFUSAL REASONABLY CONSISTENT WITH MPS--PLANNING ACT, Ss. 72(1), (4)--MUNICIPAL BOARD ACT, Ss. 25, 27(1),(2),(3),(4)--HALIFAX CITY LAND USE BY-LAW, Ss. 7, 25, 84, Schedule "F"--Halifax City MPS, Section I; Section II, Policies 2.2, 2.2.2, Objective 5, Policies 5.1, 5.2, 5.3, 7.2, 7.3, 7.6, 7.8; Section III, Policies 1.1, 1.1.1, 1.1.2, 2.1.1, 2.1.2, 2.1.2.1, 2.2, 3.1.2, 3.1.2.1, 3.3.1, 3.5.3.1, Objective 5, Policies 5.1, 5.2, 5.3, Objective 6, Policies 6.1, 6.3, Objective 7, Policies 7.1, 7.1.2, 7.2, 7.2.1, 7.3, 7.5, 7.6, 7.8

This is an appeal from a decision of Halifax City Council refusing to approve a development agreement to permit a mixed residential/commercial development at the corner of Sackville and Brunswick Streets on property formerly occupied by Citadel Motors. The Appellant applied to build a 14-storey office building and a 20-storey residential condominium on a 44,500 sq. ft. parcel of land zoned General Business (C-2). An historical military property (the Royal Artillery Park) is directly opposite the subject site and a prominent landmark and historic site (Citadel Hill) is diagonally opposite. Two other 3-storey buildings with heritage status are close by. The site is located in sub-area 3 of the Central Business District in the Municipal Planning Strategy. Because the proposed development exceeded the as-of-right maximum height of 40 feet, the Appellant required Council, after a public hearing, to approve the development by resolution conditional on entering into a development agreement. Council refused its approval. Section 72 of the Planning Act gives a right of appeal from the refusal. Counsel for the Appellant objected to the right of Heritage Trust, the Federation of Nova Scotia Heritage and the Friends of the Citadel to fully participate in the hearings.

HELD - 1. The three heritage organizations may participate in the hearing by calling evidence, by having the right to cross-examine witnesses and by filing post hearing submissions.

2. The Board is not prepared to interfere with Council's decision. The appeal is dismissed.

Under s. 27(3) of the Municipal Board Act "[a]ny person may appear and give evidence on any matter before the Board, but may not participate in the hearing except as permitted by the Board". Under s. 27(4) the Board "shall permit any person who demonstrates to the Board that he has a real and substantial interest in the subject matter of the proceeding to participate in the hearing". There is an onus on those seeking to participate. The Appellant argues that the expression "real and substantial interest" is analogous to "persons aggrieved". Subsection (3) gives the Board a very wide discretion and it is under this provision that the Board permitted the three groups to participate. While there must be a limit on the number of persons who should be given the right of cross-examination, in this case the three groups were all represented by the same experienced solicitor, which would likely reduce the possibility of repetition and redundancy. Also while it is not necessary in this case to determine whether the three groups have a real and substantial interest, it is the Board's opinion that it is not necessary to be "an aggrieved person" to have a real and substantial interest.

On the merits of the appeal, the issue is whether the decision made by Council not to enter into a development agreement is reasonably consistent with the intent of the City's Municipal Planning Strategy (MPS). The onus is on the Appellant if it is to be successful to adduce evidence from which the Board may make such a determination. The City's Staff Report recommended approval of the application. To get the intent of the MPS in the light of this specific proposal one has to examine the MPS as a whole. Section II of the MPS setting forth City-Wide Policies and Objectives apply generally to the entire City, including the Central Business District (CBD). One must examine as well Section III setting out specific policies and objectives for the CBD, which, while not exclusive, are the chief or principal ones to be applied in the City's decision-making in the CBD. For four reasons the Board determines that Council's decision was reasonably consistent with the intent of the MPS: (1) the proposed development does not comply with Policy 2.2 because it is not appropriate to the varied scale and character of sub-area 3, which is an area of low-rise buildings containing cultural, commercial and institutional uses; (2) the proposed development does not comply with Policies 1.1 and 1.1.1 relating to strengthening the desirable characteristics of the sub-area, or at least it has not been demonstrated that Council's concern for strengthening the desirable cultural uses in sub-area 3 was unreasonable; (3) the proposed development does not reasonably meet the intent of Policies 5.2 and 7.3 in that the development does not make every effort to preserve views from Citadel Hill and is not sufficiently sensitive in height and design to the relationship between Brunswick Street and the Citadel, a matter in relation to which there is an urgent need for the City to carry out the mandatory direction of Policy 7.3; and (4) the proposed development does not meet the intent of Policy 7.2.1 because it is not complementary to the adjacent

School Board and Welfare Buildings, both of which have been designated as heritage buildings.

NOTE: 1. The alderman who put the motion to deny the application appeared under subpoena and gave evidence as to why he voted against the proposal.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Statutes of Nova Scotia 1983, c.9;

- and -

IN THE MATTER OF: An appeal by A.T.C. Properties Limited from the decision of the Council of the City of Halifax made September 15, 1983 refusing to approve a development agreement to permit the construction of a mixed residential/ commercial development on lands situate on the southeast corner of Brunswick and Sackville Streets in the City of Halifax.

BEFORE:	R.H. BLOIS, Q.C., Chairman ELIZABETH LAWRENCE, Vice-Chairman DARRYL W. WILSON, C.A., LL.B.
COUNSEL:	PETER J.E. MCDONOUGH, LL.B. and HARVEY L. MORRISON, LL.B. for the Appellant. JOHN P. MERRICK, LL.B. and MICHAEL J. WOOD, LL.B. for the Heritage Trust, Federation of Nova Scotia Heritage and the Friends of the Citadel, MARTIN C. WARD, LL.B. for Parks Canada, WAYNE ANSTEY, LL.B. FOR the City of Halifax.

DECISION

This is an appeal by A.T.C. Properties Limited under Section 72(1) of the Planning Act, Statutes of N.S. 1983, c.9 from the decision of the Council of the City of Halifax made September 15, 1983 refusing to approve the Appellant's application for approval of a development agreement to permit the construction of a mixed residential/commercial development on land located at the corner formed by the south side of Sackville Street and the east side of Brunswick Street in the City of Halifax.

Counsel for the Appellant filed an affidavit (Ex. A3) respecting service of the Notice of Hearing in compliance with the Board's instructions. The Clerk of the Board advertised the Notice of Hearing by three insertions in the Halifax Herald on January 23, 1984, January 30, 1984 and February 6, 1984 pursuant to Section 25 of the Municipal Board Act, Statutes of N.S., 1981, c.9.

The Appellant's Notice of Appeal (Ex. A1) is dated October 4, 1983 and was received by the Board on the same date. The grounds of appeal stated in the Notice of Appeal are as follows:

> "(a) The Council's decision cannot reasonably be said to carry out the intent of the Municipal Development Plan [Municipal Planning Strategy] for the City of Halifax; and
>
> (b) Such other grounds as may appear."

No objection to the Board's jurisdiction to hear the appeal was raised by Counsel but the right of the Heritage Trust, the Federation of Nova Scotia Heritage and the Friends of the Citadel to fully participate in the hearing was questioned by Counsel for the Appellant. The Board decided to hear evidence from representatives of these organizations before determining whether or not to permit these organizations to fully participate in the hearing.

Evidence on behalf of the Federation of Nova Scotia Heritage was given by Tim Morrison, its Vice-President. He stated that the organization came into being in 1976 and has 100 individual members and 93 separate groups in Nova Scotia make up the membership. He outlined a brief history of the organization's involvement in various projects including the restoration of the Shubenacadie Canal, tourism and presentations to City Council respecting the Cantebury Investments development on Brunswick Street. He stated that there was a heritage issue involved as the proposed development would have an impact on Citadel Hill.

Evidence on behalf of Heritage Trust of Nova Scotia was given by Louis Collins, a member of the Board of Trustees. He stated this organization was incorporated in 1959 under the Societies Act of Nova Scotia. It provides educational materials on heritage matters and its objects include the preservation of heritage buildings. A copy of the memorandum of Association of the Heritage Trust of Nova Scotia was filed as Exhibit A9. It sets out as its object "to promote, foster and encourage interest in and preservation of buildings and sites of an historic, artistic and cultural nature within Nova Scotia, to acquire and preserve buildings and sites which are appropriate to this end and to encourage and assist in the preservation and acquisition thereof". Mr. Collins stated that the Heritage Trust of N.S. has been active in providing educational materials on heritage matters and has had a consistent and sustained interest in heritage matters in Halifax since 1963 having presented briefs to the City Council and to the Government of N.S. It had presented a brief to the City in 1971 concerning the proposed expansion of the Citadel Inn and had worked with the City's Down Town Committee in opposing the Canterbury Group development on Brunswick Street. It also had worked towards the re-implementation of building height restrictions for Brunswick Street. Mr. Collins stated that in the light of his organization's participation in Halifax developments he feels it has demonstrated a real and substantial interest in the subject matter of this appeal. He indicated that the Heritage Trust has a concern about the location and height of the proposed development because of its close proximity to Royal Artillery Park (R.A. Park) and the Citadel Hill. Mr. Collins pointed out on cross-examination that he was concerned about the impact the proposed development might have on R.A. Park and the Citadel Hill, both historic sites.

Evidence on the question of participation in the hearing was given by Anne Schultz on behalf of the Friends of the Citadel Society. She is the Chairman of the Board of this organization incorporated in December of 1980 for three purposes set forth in a working document filed as Ex. A7, namely to:

> "(1) Promote and protect the historic and environmental value of the Halifax Citadel National Historic Park.
>
> (2) Enhance the cultural and educational aspects of the park by the provision of programs and visitor services.

> (3) Support and participate in humanitarian activities related to heritage preservation."

Mrs. Schultz stated that the Friends of the Citadel Society encourages tourists to visit the Citadel and operates two businesses in the Citadel, one a store and the other a food service. She stated that the Board of her Society supports the position of the Heritage Trust of N.S. and authorized an involvement in the proceedings before this Board. She indicated that the proposed development would have an impact on the number of persons visiting the Citadel because it would affect the environment in the vicinity of the Citadel which she said was the most visited historic site in Canada. She also thought the proposed development might affect the profitability of the businesses operated by her organization in the Citadel. She stated that her Society is interested in preserving the panoramic views from the Citadel and was concerned with the development of any project which might impair some views from the Citadel.

Under Section 27(1) of the Municipal Board Act, Statutes of N.S. 1981, c.9, the parties to any application or appeal before the Board include

> "(a) the applicant or appellant;
>
> (b) the person responsible for a decision or act that is appealed;
>
> (c) any municipality and any board, commission, committee or agency thereof that may be affected;
>
> (d) the Minister."

Under s.s.(2) of Section 27, "Parties shall be notified of the commencement of proceedings and of any hearing, and may appear and participate in the hearing".

It is clear that the Heritage Trust, the Federation of Nova Scotia Heritage, the Friends of the Citadel and Parks Canada are not "parties" pursuant to Section 27(1) of the Municipal Board Act.

Subsections (3) and (4) of Section 27 of the Municipal Board Act make further provisions for persons to give evidence and participate in hearings before the Board as follows:-

s.s.(3) "Any person may appear and give evidence on any matter before the Board, but may not participate in the hearing except as permitted by the Board."

s.s.(4) "The Board shall permit any person who demonstrates to the Board that he has a real and substantial interest in the subject matter of the proceeding to participate in the hearing."

Counsel for the Appellant filed a submission (Ex. A13) setting forth his argument as to why he urged the Board to find that neither Heritage Trust of Nova Scotia, Friends of the Citadel nor the Federation of Nova Scotia Heritage have "a real and substantial interest in the subject matter of the proceeding" and should therefore not be permitted to participate in the hearing other than to make submissions. He argues that there is an "onus" on persons seeking to participate in the hearing to demonstrate to the Board that they have a real and substantial interest in the particular subject matter of the proceeding. The Board agrees with Counsel for the Appellant that there is an "onus" on those seeking to participate in a hearing before the Board.

Counsel for the Appellant pointed out that the Planning Act requires in certain circumstances that an Appellant must be "an aggrieved person" as distinct from the former requirement of being an "interested person" and he then submits that the Heritage Trust of N.S., the Friends of the Citadel and the Federation of Nova Scotia Heritage are not "persons aggrieved" and therefore would have no standing to appeal and because they would not have standing to appeal they would not have standing to participate.

Counsel for the Appellant in his submission argued that the expression "real and substantial interest" is analogous to the words "person aggrieved". He cited a number of cases where courts were faced with interpretations of the meaning of the words "person aggrieved". These cases are Robert Cream & Co. Ltd. v. Dodds & Co. [1930] S.C.R.307; Eading Corporation v. Jones [1959] 1 Q.B.384; Buxton v. Minister of Housing and Local Government [1961] 1 Q.B.278; Ex. Parte Sidebotham (1980) 14 Ch.D.458 and Halifax Atlantic Investments Ltd. et al v. City of Halifax et al (1978) 28 NSR(2d)193 a decision of the Appeal Division of the Supreme Court of Nova Scotia in which Coffin J.A. stated: "It is my opinion that the facts must be within the reasoning of cases such as Ex Parte Sidebotham before a person can bring himself within the statutory meaning of a party aggrieved".

Counsel for the three heritage groups argued that the Board has a discretion under s.s.(3) of Section 27 of the Municipal Board Act to permit persons who appear and give evidence to participate in the hearing and that this discretion in the Board is not affected by the provisions of s.s.(4) of

Section 27. He also argued that these groups have by their evidence demonstrated that they have had a sufficient interest and involvement which would entitle them to participate.

Counsel for the City argued that the Appellant's submission only dealt with the legal question of what constitutes a "real and substantial interest in the subject matter of the proceeding". He argued that the Planning Act contemplates a full participation by the public in planning matters and that the Board has a discretion under s.s.(3) of Section 27 to allow persons with less than a real or substantial interest to participate.

Counsel for Parks Canada supported the arguments made by Counsel for the heritage groups.

The Board after hearing argument on the right of the three heritage organizations to participate in the hearing recessed the hearing to the afternoon of the day that the hearing commenced. The Board ruled that it would allow the three heritage groups to participate in the hearing by calling evidence, and by having the right to cross-examine witnesses and the right to file post hearing submissions.

It is the Board's opinion that s.s.(3) of Section 27 of the Municipal Board Act gives the Board a very wide discretion whereby the Board "may" permit "any person" who appears and gives evidence to "participate" in the hearing by way of calling evidence, cross-examining witnesses and making written submissions to the Board. This discretion given to the Board would enable the Board in an appropriate case to permit a greater participation in a hearing by a person who appears and gives evidence. Obviously there must be a limitation on the number of persons who should be given the right of cross-examination. In the case at hand the three heritage groups were all represented by the same experienced solicitor which would likely reduce the possibility of repetition and redundancy on the part of the three groups, all three of which demonstrated that they have a very sincere and continuing interest in the proposed development or any proposed development which might impact on Citadel Hill.

It is the Board's opinion that s.s.(3) and s.s.(4) of Section 27 of the Municipal Board Act may be read and interpreted separately. s.s.(3) of Section 27 gives a right to any person to appear and give evidence but only to participate to the extent permitted by the Board. s.s.(4) of Section 27 requires the Board to permit "any person who demonstrates to the Board that he has a real and substantial interest in the subject matter of the proceeding to participate in the hearing". In other words, the Board is obliged to permit persons to "participate" in the hearing if they "demonstrate" that they have a real and substantial interest.

The Board exercised its discretion under s.s.(3) of Section 27 and permitted the three groups in question to participate. While it is not necessary in this case for the Board to determine whether or not the three groups are persons having a real and substantial interest in the subject matter of the proceedings, it is the Board's opinion that it is possible for a person to have a real and substantial interest in proceedings before the Board but this person is not necessarily in the category of "an aggrieved person". An "aggrieved party" is defined in Black's Law Dictionary, 5th ed. as "one whose legal right is invaded by an act complained of or whose pecuniary interest is directly affected by a decree of judgement. One whose right of property may be established or divested. The word aggrieved refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of a burden or obligation".

The Board commenced the hearing of the appeal on the merits in the afternoon of February 13, 1984 and the hearing of the evidence concluded in the afternoon of February 16, 1984. Subsequent to the hearing written submissions were filed with the Board by counsel on behalf of (1) The Appellant (2) The City of Halifax (3) Parks Canada and (4) The Heritage Trust, Federation of Nova Scotia Heritage and Friends of the Citadel. Rebuttal briefs were filed by Counsel for the Appellant and the three heritage groups. The last of these briefs was received by the Board on March 12, 1984.

The following witnesses testified at the hearing:-

(1) Tim Morrison, Vice-President of the Federation of Nova Scotia Heritage.

(2) Louis Collins, a member of the Board of Trustees of Heritage Trust of Nova Scotia.

(3) Anne Schultz, Chairman of the Board of the Friends of the Citadel.

(4) William Lydon, an architect of Lydon Lynch Associates Ltd.

(5) Raymond Affleck, an architect with Arcop Associates of Montreal and Toronto.

(6) Simpson McLeod, an architect and planner employed by the City of Halifax.

(7) Nicholas Meagher, Alderman representing Ward 1 of the City of Halifax.

(8) Maurice Lloyd, a civil engineer and planner employed as Manager, Atlantic Region by Underwood McLellan Limited.

(9) Dr. Allan Duffus, a Halifax architect.

(10) George C. Ingram, an employee of Parks Canada

and (11) Joanne S. Lamey, an employee of the Community Planning Association of Canada, N.S. Division.

The Appellant A.T.C. Properties Ltd., made application to the City on March 29, 1983 for a contract development under Schedule "F", Section 84 of the Land Use By-law to construct a mixed residential/commercial development which would include a 14-storey office building and a 20-storey residential condominium building on a parcel of land containing 44,500 square feet bounded on the north by Sackville Street, on the east by Market Street, on the south by the extension westerly of the north side of Blowers Street and on the west by Brunswick Street. The subject site is zoned General Business Zone (C-2), is located within sub-area 3 of the Central Business District (CBD) as outlined in the City's Municipal Planning Strategy and comes under the provisions of Schedule "F" of the City's Land Use By-law, a copy of which was filed as Exhibit A16.

Schedule "F" of the City's Land Use By-law is contained in Section 84 which reads as follows:

"In any area shown as Schedule "F", any use shall be permitted which is permitted by the zoning designation of such area, provided that:

(a) Uses permitted in the C-2 Zone shall not exceed 40 feet in height;

(b) No parking lot shall be permitted;

(ba) No amusement centre shall be permitted;

(c) No parking garage shall be permitted;

(d) Council may, after public hearing and by resolution, approve any specific development requested which would not otherwise be permitted by this Bylaw, provided that no approval shall be given inconsistent with the Municipal Planning Strategy, or inconsistent with Section 7 or 25 of this Bylaw;

(e) Approval by Council under subsection (d) above shall only be granted subject to the condition that the registered owner of the land upon which the development is to occur shall enter into an agreement with Council containing such terms and conditions as Council may direct."

Since the proposed development exceeds the as of right height limit of 40' for uses permitted in the C-2 Zone, the Appellant was obliged to apply to the City under the provisions of Section 84(d) of the Land Use By-law. Under these provisions the City Council, after a public hearing, may by resolution approve "any specific development requested which would not otherwise be permitted by this By-law, provided that no approval shall be given inconsistent with the Municipal Development Plan, or inconsistent with Section 7 or 25 of this by-law".

The development proposed by the Appellant for the 44,500 sq. ft. lot in question includes a 13-storey (from Brunswick Street) office tower on the northern portion of the site at the corner of Brunswick and Sackville Streets and a residential condominium building south of the office tower which would have a high-rise portion of 20-storeys in height above Brunswick Street and a low-rise portion of 4-storeys on the southern end. The southern portion of the site is subject to the restrictions imposed by View Plane No. 7.

The residential and office components of the project are connected at the lobby levels by a retail "galleria". These components are also connected by a below-grade parking garage. The residential component provides 84 condominium units having an average net floor area of approximately 1,369 sq. ft. Of the 84 total number of units, the 4-storey low rise portion of the building will contain 6 two-storey, 3 bedroom town house units at grade level with 8 two-bedroom units above, and an indoor pool and outdoor garden at roof level. The 20-storey condominium tower is outside the view planes established by the "View Map" forming part of the City's Land Use By-law. The residential component has a set-back of approximately 60 ft. from Brunswick Street.

The first two levels of the office tower component are designed for retail and commercial use. A level access to the upper retail level is available from Brunswick Street and a level access to the lower retail level is available from Market Street. The plans call for a continuous outdoor sheltered pedestrian arcade from Brunswick Street to Market Street which would connect the two entrances of this building. Approximately 23,000 sq. ft. of retail space is provided.

The "galleria" will connect the Brunswick and Market

Street entrances via escalators. This galleria would provide all weather access to the retail, office and residential lobbies. The 12-storey commercial office space located above the 2-storey retail base contains approximately 137,000 sq. ft. of gross floor area and 122,000 sq. ft. of net leasable floor area. The floor area ratio of the office-retail building is approximately 9.35. The proposal also includes an underground parking garage for 160 automobiles which would provide one parking space for each of the 84 residential units and 76 spaces for the office tower. Vehicular access to the parking area would be from the south end of Market Street.

The architectural design of the development is intended to complement the scale and character of the heritage buildings on Brunswick Street such as the Board of School Commissioners' building on the northeast corner of Brunswick and Sackville Streets, through the use of a brick-base building along Brunswick, Sackville and Market Streets.

The subject site has been used until quite recently for purposes of an automobile dealership and is known in the community as the Citadel Motors site because the dealership was operated for many years by Citadel Motors Limited.

Directly opposite the subject site on the west side of Brunswick Street is a large track of land, known as R.A. Park which is an historical military property. Diagonally opposite the subject site at the northwest corner of Sackville and Brunswick Street is the Citadel Hill property which in addition to being an historic site is the most prominent landmark in the City of Halifax. Directly opposite the subject site at the northeast corner of Sackville and Brunswick Streets is the historic red brick building known as the School Board Building which was formerly the Halifax County Academy Building. Further north of the School Board Building on Brunswick Street is another red brick historic building known as the Welfare Building. Both of these buildings are four-storeys high and both have received heritage status.

The issue in this appeal is whether or not the decision made by the Council not to enter into a development agreement is reasonably consistent with the intent of the City's Municipal Planning Strategy (MPS). The Council's decision in refusing to enter into an agreement gave rise to an appeal to this Board by the Applicant under Section 72(1) of the Planning Act, Statutes of N.S., 1983 c.9.

s.s.(4) of Section 72 of the Planning Act, provides that:

"The Board shall not interfere with the decision of the Council pursuant to this Section unless the Board determines that the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the municipal planning strategy, in which case the Board shall

(a) refer the matter back to the council; and

(b) instruct the council to hold a public hearing in accordance with Section 42, if this had not been carried out prior to the appeal being made by the applicant."

S.S.(4) of Section 72 directs the Board not to "interfere" with the Council's decision unless the Board determines that the Council's decision "cannot reasonably" be consistent with the intent of the City's M.P.S. This sub-section has the effect of creating an onus on the Appellant if it is to be successful to adduce evidence from which the Board may make such a determination.

The Board's duty therefore is to review the proposed development in the light of the evidence adduced at the hearing and in light of the intent of the M.P.S. in order to make a determination as to whether or not the proposed development is consistent with the intent of the M.P.S.

The Appellant's application for a contract development was received by the City on March 29, 1983 and the City Manager by letter to City Council dated June 9, 1983 recommended that Council set a date for a public hearing to consider the application. At a meeting of City Council held June 16, 1983 Council set July 20, 1983 as the date for the public hearing. On July 7, 1983 a Staff Report (item #4 of Exhibit A14) was prepared for the Council. After describing the nature of the project and the relationship of the proposal to the M.P.S. and referring to some technical aspects of the proposal the report sets out the following conclusion on page 7 viz: "In the opinion of staff, the design of the proposed project takes careful consideration and fully meets the context of the M.P.S. The proposal also takes sympathetic consideration of the design scale and character of Brunswick Street and the adjacent historic structures. The project is visually attractive and will make a positive contribution to the image of the City".

The Staff Report sets forth the following recommendation:

"1. The application for a contract development from A.T.C. Properties Limited for the block south of Sackville Street, bounded by Brunswick, Sackville and Market Streets, to construct a mixed residential/commercial development, as shown on Plans No. P200/10835-48 and 10850, be approved by City Council.

EITHER

2A. Council authorize the purchase of Parcels E and F from the developer for street purposes for the price of $100,000 with the cost of full street improvements along Brunswick and Market Streets abutting the project to be cost-shared on a 50-50 basis between the City and the developer.

OR

2B. Council accept the developer's proposal to convey Parcels E and F to the City for street purposes for the sum of One Dollar with the full cost of street improvements along Brunswick and Market Streets to be the responsibility of the City.

3. Council require that the contract shall be signed within 120 days, or any extension thereof granted by Council on request of the applicant, from the date of final approval by Halifax City Council and any other bodies as necessary, whichever approval is later, including applicable appeal periods; otherwise, the contract approval will be void and obligations arising hereunder shall be at an end.

A draft contract is attached for the information of Council. The date for the Public Hearing is July 20, 1983."

The City's Staff Report sets out in Appendix "A" what staff considered the relevant M.P.S. policies relating to the C.B.D. as follows:-

"2.1.1 The construction of office and retail buildings in the CBD should be those which reinforce the image of the City as the regional centre of activity, and should generate the need for services and amenities (hotels, entertainment, restaurants, etc.) which will provide an active CBD.

2.1.2 The City should require that space adjacent to areas of pedestrian circulation, including walkways at any level, be developed for retail activities and such other uses as generate and encourage the desired degree of public interest and activity.

2.1.2.1 The City should require that any vertical surface between a pedestrian circulation area and any retail or such other use as referred to in 2.1.2 respond to such functions, or through design treatment of surface elements, be visually stimulating to the pedestrian.

2.2 The City shall promote the development of mixed-use residential and commercial areas which are appropriate to the varied scale and character of the sub-areas of the CBD.

3.1.2 The City should prepare and implement a plan for the improvement of the present pattern of pedestrian linkages, to ensure that people can move safely and comfortably throughout the CBD.

3.1.2.1 The City should seek the provision of weather protection for pedestrians, particularly at street level, where new development or major alterations to building facades abut pedestrian routes in the CBD.

3.3.1 Long-term parking facilities should be located on the periphery of the CBD, and the City shall actively pursue their location in appropriate sites.

3.5.3.1 The City should require loading and unloading for large new developments to be accommodated off-street.

5.2 The City shall seek the incorporation of vegetation and landscaping as essential elements in the design of new developments in the CBD, and shall encourage the provision of planting throughout the CBD.

6.1 All new buildings shall be located so that views to the Harbour from Citadel Hill, as specifically delineated in the City of Halifax Zoning Bylaw, are maintained. These areas in the CBD are illustrated generally on Map 12.

6.3 The City should encourage rooftop landscaping in any new developments which can be seen from the Citadel, from taller buildings, or from other parts of the City.

7.1 The City shall generally retain the remaining street grid and City block pattern in the CBD.

7.1.2 The City shall encourage the architectural form and scale of new developments to be compatible with the block pattern, and shall discourage those developments which do not respect it.

7.2.1 The exterior architectural design of new buildings should be complementary to any adjacent ones which are designated as being of historic significance or important to the character of the CBD; in such instances, the careful use of materials, colour, proportion, and the rhythm established by surface and structural elements should reinforce those same aspects of the existing buildings.

7.5 The design of new developments in the CBD should be such that normal wind levels on outdoor pedestrian routes and in public open spaces will be acceptable.

7.6 The design of new developments in the CBD should be such that there will be a minimal amount of shadow cast on public open spaces."

A public hearing was held by the Council on July 20, 1983 and the minutes of that hearing are set forth in item #48 of Exhibit A14. The minutes indicate that a number of persons made presentations to the Council on July 20, 1983 including persons on behalf of the Applicant and persons in opposition to the proposal. Also 42 letters from persons against the proposal were received by the City. Copies of these written submissions form part of Exhibit A14. Heritage Trust of Nova Scotia, the Friends of the Citadel Society, Federation of Nova Scotia Heritage, Parks Canada and the Urban Committee of the Ecology Action Centre presented submissions to the Council on July 20, 1983. Following the public hearing the matter was forwarded to the next regular meeting of the Council without recommendation.

At the request of certain aldermen staff prepared a Supplementary Report dated July 26, 1983 for the Council. This report states amongst other things that at the southeast corner of the Citadel, the ramparts are approximately 244 ft. high. Given the proposed height of the residential and commercial sections of the Brunswick and Sackville Street developments being 335 ft. and 310 ft. respectively, this means that the residential building rises approximately 91 ft. above the ramparts, and the commercial 66 ft. above the ramparts. The report states also that the "proposed buildings will be able to be seen from the inside of the Citadel ---". It also states that "the top of the North American Life Centre is at 232 ft. with ground elevation being 130, giving a height above Brunswick Street of 102 ft. This places the top of the North American Life Centre below the ramparts".

The next regular meeting of the Council was held on July 28, 1983 the minutes of which relating to the application in question are set out as item #82 of Ex. A14. A portion of these minutes read as follows: "A public hearing into the above matter was held on July 20, 1983. A private and confidential staff report dated July 22, 1983 was submitted. Alderman Nolan expressed the view that all the necessary information to making a decision had not been provided; and moved, seconded by Alderman O'Malley that the matter be deferred until such time as all the material relevant to a decision has been re-examined with the Planning Department, the developers and staff, and that this include all laws and regulations relating to such a development". These minutes indicate that 26 submissions opposing the application had been received since the public hearing and had been circulated to members of Council.

The Council deferred the matter to the next regular Council meeting.

City staff prepared a Supplementary Report for City Council dated August 5, 1983 a copy of which is included in Exhibit A14 as item #92. This report indicates that staff and representatives of the developer met on August 4, 1983 and discussed the proposed development. Staff reached the conclusion "that the proposal is in compliance with all relevant policies as outlined in the staff report dated July 7, 1983". The report states that the representatives of the developer described certain reductions to the proposed development "which they would be willing to undertake should they be directed to do so by Council". The proposed changes would result in an 11-storey office building and an 18-storey residential building. The staff report states that the proposed reduced development meets the M.P.S. Staff recommended to Council that the original development be approved.

On August 25, 1983 the A.T.C. Properties Ltd. proposed development again appeared on the City Council's agenda. The munutes of the Council meeting held August 25, 1984 indicate that the August 5, 1983 staff report and a "private and confidential report from the City Solicitor dated August 25, 1983 was also submitted" to the meeting. Council deferred the matter to a Special Meeting of the Committee of the whole Council at which time "the solicitors for Heritage Trust and the Federation of Nova Scotia Heritage shall have the opportunity to address the meeting, along with representation from the City Solicitor's department on their interpretation of the legal portion and staff representation addressing their position". Four additional items of correspondence received since the public hearing were submitted. Council set September 1, 1983 as the date for the Special Meeting.

At the September 1, 1983 meeting of Council a legal representative on behalf of Heritage Trust and the Federation of Nova Scotia Heritage made a submission as did counsel on behalf of the developer. Submissions were also made by the City Solicitor and the City's Director of Planning.

The proposed development once again appeared on the Council's Agenda for its meeting held September 15, 1983. Since the previous meeting some further correspondence had been received by the City and the City Solicitor provided Council with a private and confidential supplementary report dated September 14, 1983. On motion the application for contract development was dismissed by the Council for the following reasons:-

> "1. The design of the two towers is not sufficiently complementary to the adjacent historic sites and buildings, in particular the proportions, massing, and building lines do not reinforce those same aspects of the existing buildings contrary to the Municipal Plan C.B.D. Objective 7 and Policies 7.2 and 7.2.1.
>
> 2. The development would not strengthen the desirable cultural uses in the C.B.D. Sub-Area 3, as set in Schedule III-1 and C.B.D. Economic Policies 1.1, 1.1.1, 1.1.2.
>
> 3. The development is contrary to C.B.D. Objective 7, particularly with regards to topography.
>
> 4. The development does not make every effort to preserve views from Citadel Hill, contrary to City-

> wide Objective 5 and Policies 5.1 and 5.2 or to complement the view from Citadel Hill as required by Policy 5.3 and C.B.D. Objective 6.
>
> 5. Furthermore, the development does not fulfill the overall Objectives of the Municipal Development Plan as stated in Section I and it does not conform to the general intent of the Municipal Development Plan as expressed in Policies concerning the protection of and compatibility with the environment."

It is interesting to note from the minutes of the Council Meeting of September 15, 1983 (item #112 of Exhibit A14) that there were five aldermen in favour of the motion and three against. Following the vote on the motion, one alderman who had voted for the motion advised the meeting that he had meant to vote in favour of the proposed development. The minutes state that the Chairman of the meeting ruled that it would not be proper to change one's vote after the actual vote had taken place. The Chairman also ruled that a motion of reconsideration would not be in order. Some individual aldermen who had voted in favour of the motion gave further reasons to those contained in the Council's motion.

Evidence on behalf of the Appellant was given by William L. Lydon, an architect and urban designer and a principal of Lydon Lynch Associates Limited. His firm has been employed by the Appellant to design the buildings proposed for the subject site. Mr. Lydon obtained his Bachelor of Architecture in 1967 and his Master of Architecture in 1976. He has had 15 years of professional experience as an architect. He was accepted by the Board as an expert witness in matters of architecture.

Mr. Lydon described the subject site as being slightly larger than one acre with frontage on Sackville Street of 130' and frontage on Brunswick Street of 340'. He considers the site to be an unique parcel of land because it is free of heritage designations and is 80% clear of the City's view planes and does not contain any buildings of historic merit.

Mr. Lydon stated that the commercial office building would be 170' and the residential tower would be 195' above Brunswick Street. With the aid of site development plans and sketches he described the proposed development emphasizing that the proposal would not be affected by any of the existing view planes set out in the City's Zoning By-law. He explained the proposed sheltered pedestrian way which would go along Brunswick, Sackville and Grafton Streets. With the aid of sketches filed as Exhibits A23 and A24 he explained how the design of the development picks up the street scape on Brunswick Street. Exhibit A19 is a "Site Development (Roof) Plan".

Mr. Lydon explained how the proposed office and retail tower at the corner of Sackville and Brunswick Streets would have a 4-storey brick projection 15' wide designed to complement the architecture of the School Board building located directly across the street at the southeast corner of Sackville and Brunswick Street. The height of this projection would approximate the height of the School Board building.

Architectural evidence was also given by Mr. Ray T. Affleck, the senior partner of Arcop Associates Architects of Montreal and Toronto. Mr. Affleck has had an involvement with Halifax for the past 10-12 years. He had been involved in the study of the Halifax waterfront on behalf of MAPC in 1972 (Exhibit A26). He is associated with Mr. Lydon in connection with the Appellant's proposal for the subject site. He stated he does not have a detailed knowledge of the City's MDP (MPS) and relies on Mr. Lydon's knowledge of that document. He did however offer the opinion that the proposal does meet the intent of the MDP. When asked on direct examination if he considered the proposed development sympathetic with the other buildings in the area stated that the lower 3 or 4 floors are based to some extent on the design of the School Board building and other historic buildings in the area. He stated that the design of the proposed development was intended to create a perceptual continuation of the roof and building lines of the School Board building by the use of low-rise (4-storey) facades on the office tower. He indicated that these facades were an attempt to make the office tower appear more neutral and to create a perception to the pedestrian of the type of architectural detail that is characteristic of historic Halifax buildings. He pointed out that the drawings now available were preliminary ones. He described the development as an infill project.

On cross-examination he was referred to the Halifax Waterfront Development Planning Study (A26) which had been prepared by his firm Arcop Associates and he had taken part in this study. In this study is a Section (#3) respecting views. The following is an extract from the study's conclusions about views:

> "A major constraint on construction in downtown Halifax is the consideration of views. The most important of these is the view from the Citadel. This vista is of major historic, symbolic and aesthetic significance to Haligonians and visitors alike. Other important views are the view of the

> Citadel from downtown streets, and the view of the water from downtown streets. Consideration should also be given to the view from the ferry, the view from Dartmouth, and even the view from Scotia Square (which is probably experienced by more people every day than any of the others).
>
> The view from the Citadel has changed drastically in the past few years, and some would argue that not all the changes are improvements. In addition a great deal of building is under construction or planned just at the foot of the Citadel which will change the view very drastically in the future. It is clearly too late to try to preserve a small scale vista with a complete view of the water and the Dartmouth shore line intact. The best one can hope for is a dynamic combination of the old and new, the low and high, of water and building. To ensure that this happens means maintaining those views of small old buildings and of the harbour which still exist."

This MAPC study was prepared prior to the City's adoption of its view planes legislation. Mr. Affleck stated that the study was a conceptional one and he admitted the proposed development would appear to contravene some of the conceptional ideas in the study. On cross-examination Mr. Affleck readily admitted that the proposed development would cause the loss of some views from the Citadel but did not offend the City's view planes. On a photo (Ex. A-27) taken from a point on Citadel Hill he marked in a portion of the proposed development indicating a loss of view of the harbour.

Mr. Lydon on being recalled made reference to Exhibit A29 prepared by him and entitled: "A Comparative Analysis of Major Commercial Buildings" located outside the view planes in the C.B.D. This analysis excludes public buildings. Statistics shown in A29 are (1) age of building (2) height in feet (3) net area in square feet (4) gross area in square feet (5) site area in square feet and (6) floor area ratio (FAR). In terms of height above grade the average height of the Appellant's two buildings of 182.5 ft. $\frac{(170' + 195')}{2}$ is below the average height (226') of the buildings shown. The Maritime Centre is shown to be 252' and the tallest bank building (Toronto Dominion) to be 228'. The Appellant's commercial building is shown as 254,000 sq. ft. of net area which is greater than the average (228,017) of the commercial buildings shown. Also the gross area of the subject building is shown to be 295,000 against the average of the building shown at 262,300 sq. ft. The site area of the subject site of 44,500 sq. ft. is larger than the average (30,900) of the buildings shown on A29. Finally A29 shows the F.A.R. of the subject site to be 6.6 as compared to the average of 10.6. The North American Life building on Brunswick that is shown as having a F.A.R. of 5.7.

Mr. Lydon indicated that the residential tower of the proposed development would be 81 ft. above the Citadel. He said the proposed buildings are high but not inordinately so. On cross-examination when confronted with the fact that the proposed commercial tower of 170' would be nearly twice as high as the North American Life building (90') he commented that his building will not be "perceived to be". He admitted that the proposed development would be higher than the ramparts on Citadel Hill. Also on cross-examination Mr. Lydon stated that the subject site was within sub-area 3 of the C.B.D. This area is shown on Map 10 attached to the City's M.P.S.

Sub-area 3 is located at the southwest corner of the C.B.D. and is bounded on the west by Brunswick Street, on the north by Sackville Street, on the east by a line midway between Argyle and Barrington Streets from Sackville to Blowers Street, by Barrington Street between Blowers and Spring Garden Road and by Spring Garden Road on the south.

Sub area 3 of the C.B.D. is identified in the M.P.S. as a "Cultural Area - a sub-area with an existing emphasis on cultural functions, including churches, the library, Neptune Theatre, small specialty shops".

Further architectural and planning evidence was given by Simpson McLeod, a qualified architect and planner employed as a Senior Planner for four years by the City. He was called by the Appellant. He had previously worked for Parks Canada for about 2½ years. He explained the procedure in the City after the receipt of a contract development application. He explained that copies of the application are sent to various City departments and comments from each department are submitted to the Development Department which then prepares a staff report which is submitted to the City Manager who signs the report and forwards it to the Mayor and members of Council. He referred to the Staff Report dated July 4, 1983 (Item 4 of Ex. A14) and stated that he had prepared the Planning Department's comments. When asked by counsel for the Appellant if he was aware of any negative comments from any City department, he answered "no".

Mr. McLeod was asked to comment on the reasons adopted by the City Council in refusing to approve of the proposal. He considered that the Council's reasons were not valid and that the proposed development did meet the policies and objectives of the C.B.D. Section of the M.P.S. He indicated that because the proposed project is located within the C.B.D. that Section II of the M.P.S. does not apply. Section II contains the City-wide Objectives and Policies of the M.P.S. whereas Section III contains the C.B.D. Objectives and Policies. He was of the opinion that the proposed development meets the overall objective of the M.P.S. He also expressed the opinion that the reasons for rejecting the proposal referred to by Alderman Cromwell (re Policies 7.3 and 5.2) did not apply as they relate to policies contained in Section II of the M.P.S.

On cross-examination Mr. McLeod agreed that the Council's decision must reasonably be consistent with the M.P.S. He also agreed that scale is not solely a function of size and that size is an important factor in scale. When asked if he was the main author of a Draft Brunswick Street Detailed Area Plan filed as Ex. A32, he said he was. This plan contains a proposed height restriction for Brunswick Street of 40 ft. Mr. McLeod pointed out that the Brunswick Street Draft Plan had never been approved by the City and therefore had no legal validity.

On the cross-examination of Mr. McLeod by counsel for the City, it was suggested that paragraph 4 on page 4 of the Staff Report (item 4 of A14) which states: "The proposal also meets Policy 2.2 which requires the development of mixed use residential and commercial areas" is not how Policy 2.2 of Section III of the M.P.S. reads. Policy 2.2 reads as follows:

> "The City shall promote the development of mixed-use residential and commercial areas which are appropriate to the varied scale and character of the sub-areas of the CBD."

This policy appears under the "Social" heading in Section III of the M.P.S. Counsel for the City suggested to Mr. McLeod that the drawing filed as Exhibit A28 and the model of the proposed development filed as Exhibit A18 did not show the same perspective and the witness agreed that that was so. However, on re-examination Mr. McLeod when asked if the model was distorted as to scale stated that he had not measured it but added that he had not relied on either the model or the perspective drawings so his opinion would not change if there was in fact some distortion in the model.

Evidence was given by Alderman Nick Meagher who appeared under subpoena. He is the Alderman for Ward 4 in the City. He explained that of the 12 Aldermen only 8 were eligible to vote on the A.T.C. Properties Ltd. proposal. He indicated that the motion to deny the application was put by him and he had voted against the proposal. He stated that the #1 objection to the proposal was the massing of the building. Secondly, because of the topography of the land which slopes downwards from the Citadel to the harbour he thought tall buildings should be away from the top end, that is the Citadel end. He considers the proposed buildings overwhelm sub-area 3 of the C.B.D. He considers that a development on the subject site should relate to existing heights on Brunswick Street and to the existing buildings in sub-area 3. He also pointed out the historical importance of the Citadel which he felt needs some protection.

Expert planning evidence was given by Maurice Lloyd, a professional engineer and planner and former Director of Community Planning, Dept. of Municipal Affairs called on behalf of the Appellant. When asked his opinion as to whether the Council was reasonable in rejecting the proposed development in the light of the staff recommendation for approval, Mr. Lloyd said the Council should be very cautious in going against the staff's recommendation and in this case he was of the opinion that the Council should not have rejected the proposal based on the City's M.P.S. and the research carried out by the City's staff.

Evidence on behalf of the heritage groups and Friends of the Citadel was given by Dr. Allan F. Duffus, the President of Architectural Resource Consultants Ltd. and a past President of the Nova Scotia Association of Architects, a past President of the Heritage Trust of N.S. and a founding member of the Landmarks Commission of Halifax. Dr. Duffus referred to Policy 1.1 of Section III of the City's M.D.P. which reads as follows:

> "It shall be the City's policy to strengthen the development of the specific desirable characteristics of identified sub-areas of the CBD, as defined on Map 11 and in Schedule III.1 to provide the impetus necessary to ensure the viability of all parts of the CBD. The City shall accomplish the intent of this policy and all policies in Part II, Section III, Subsection 1 of this Plan, by Implementation Policy 3.5."

Dr. Duffus also referred to Policy 2.2 of Section III of the M.D.P. quoted on page 18 of this decision. Dr. Duffus was of the opinion that the proposed development is out of scale with buildings in the immediate area. He considered the proposed development because of its mass, size and texture was inappropriate for the sub-area 3 and was not complementary to the sub-area. He considered that the scale of the project was such that one would be overwhelmed by the proposal. When asked his opinion about the attempt by the developer's architects to bring the commercial building into scale by the special treatment of the building by the addition of the four-storey brick facade, Dr. Duffus called this an unnecessary appendage to create an impression.

On cross-examination, Dr. Duffus stated that he does not find fault with the design of the proposed towers but he considered that the appendages at the bottom of the commercial tower do not create an honest impression. He was of the opinion that the buildings were out of scale and the special treatment of a building for the bottom four floors would not change the scale. On cross-examination Dr. Duffus admitted that he was in favour of the Central Trust Company 20-storey building now under construction in the C.B.D. across the street from some historical buildings. He justified his approval of that building on the basis that it was a building completing a block of highrise buildings and would have no adverse effect on the historical buildings.

George C. Ingram, an employee of Parks Canada since 1963 and the Superintendent of the Halifax Defence Complex, a grouping of historic parks and sites in the Halifax area testified. He is responsible for the management and operation of historic resources in the Halifax area. He prepared a submission filed as Exhibit A39.

The submission by Mr. Ingram states that Parks Canada is entrusted with the preservation and protection of the Citadel, a heritage resource of national significance and as an adjacent land owner is particularly interested in developments along Brunswick Street. He considers that the proposed development "would have negative impact on the restoration project now underway and upon the whole integrity" of the Citadel. His submission states that "the mass and scale of the proposed development would impair our visitors' appreciation of the Citadel's setting visually and strategically. Visitors standing on the ramparts will feel overwhelmed by this development constructed so close to the Citadel ---". Mr. Ingram states that the proposed development is "not in keeping with the intent of City-Wide Objective 5 and Policies 5.1, 5.2 and 5.3, which are designed to ensure development compatible with heritage resources within the City, in this context Policy 5.2 specifically mentions the Halifax Citadel".

The Parks Canada submission alleges that the proposal fails to comply with Policies 7.2, 7.3, 7.6 and 7.8 of Section II the City-Wide Section of the M.D.P.

The last witness to testify was Joanne S. Lamey, an employee of the Community Planning Association of Canada, N.S. Division who presented a brief (Exhibit A40) on behalf of her organization. This brief states that the Board of Directors of CPAC/Nova Scotia supports the decision of City Council. This brief concludes by stating that "CPAC is of the opinion that the Nova Scotia Municipal Board can not only uphold, but strengthen Council's decision if it is guided by the objectives and policies of Section II in addition to those from Section III".

The Board under s.s.(4) of Section 72 of the Planning Act is directed not to interfere with the decision of the Council unless the Board determines that Council's decision "cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy". In the Board's opinion to get the intent of the M.P.S. in the light of this specific proposal one has to examine the M.P.S. as a whole.

Section I of the M.P.S. sets forth the overall objective of the M.P.S. and for on-going planning as follows:

"The enhancement of the physical, social, and economic well-being of the residents of Halifax through the preservation, creation, and maintenance of an interesting and livable city, developed at a scale and density which preserve and enhance the quality of life."

The subject site lies within the Central Business District (CBD) which originally included "all of the area bounded by the centre line of Brunswick Street, the centre line of Cogswell Street, Halifax Harbour, the centre line of Spring Garden Road to Barrington Street, the centre line of Salter Street, including the Maritime Centre". An amendment to the M.P.S. extended the C.B.D. southerly to the eastern extension of the southern boundary line of the Maritime Centre to the harbour.

The subject site is situate within sub-area 3 of the C.B.D. which is one of eleven sub-areas in the C.B.D. As has been noted previously in this decision sub-area 3 is referred to in the M.P.S. as a "Cultural Area", "with an existing emphasis on cultural functions, including churches, the library, Neptune Theatre, small specialty shops". The subject site is zoned General Commercial Zone (C-2) which does not permit the proposed development. The site is also within Schedule "F" of the City's Zoning By-law which provides that the City Council may by resolution permit a specific development, not otherwise permitted by the By-law provided that the approval is not inconsistent with the M.P.S. and with the view planes' restrictions contained in Section 25 of the City's Land Use By-law (Exhibit A16).

Counsel for the Appellant in paragraph 10 of his post-hearing brief argues that Section II of the M.P.S. setting forth City-Wide Policies and Objectives "expressly does not apply to the Central Business District". With respect the Board does not agree with this argument. In paragraph 6.02 of his brief Counsel for the Appellant states that "It is the Appellant's position and we understand, that of the City of Halifax also, that the City-Wide Objectives apply only generally to land within the Central Business District". It is the Board's opinion that the City-Wide Objectives and Policies apply generally to the entire City.

It is the Board's further opinion that in an appeal relating to land within the C.B.D., made pursuant to Section 72(1) of the Planning Act, the Board in determining whether or not the Council's decision refusing to enter into a development agreement can reasonably be said to be consistent with the intent of the M.P.S., must examine the proposal in the light of the specific policies and objectives found in the C.B.D. (Section III) of the City's M.P.S. as well as in the light of the City-Wide Policies and Objectives set out in Section II of the M.P.S.

In the appeal by the Minister of Environment et al respecting the Canterbury Investments' project on Brunswick Street, (Vol. 11, page 1495 of the Provincial Planning Appeal Board Reports) the Planning Appeal Board in assessing the proposed development in relation to the City's M.D.P. (now M.P.S.) stated among other things at p. 1505 that "In the Board's opinion, while the proposed development under consideration must generally meet the City-Wide Objectives and Policies it must meet the detailed objectives and policies for the C.B.D. set forth in Section III of the M.D.P. which shall constitute the "basis" for the City's decision. Chief Justice Cowan of the Trial Division of the Supreme Court of N.S. in the case of Heritage Trust et al (1982, 50 N.S.R. (2d) 352 in upholding the Provincial Planning Appeal Board's decision in the Canterbury Investments' case in finding that the Board did not make "any error, whether minor or trivial" gave approval to the Board taking into consideration, not only the specific policies and objectives contained in Section III of the M.P.S. but also the City-Wide Policies and Objectives in Section II. Thus it is relevant for this Board in determining whether the decision of the Council under appeal meets the intent of the M.P.S. to examine the Appellant's proposed development in the light of all relevant Sections of the M.P.S. including Section II and in particular Section III.

Policies 2.2 and 2.2.2 of the City-Wide Objectives of the M.P.S. set out in the Commercial Facilities portion of Section II of the M.P.S. are relevant to this appeal. Policy 2.2 of Section II of the M.P.S. designates the Halifax C.B.D. as the principal business centre in the Halifax-Dartmouth region and indicates a wide range of uses and facilities which shall be included in this area. It reads as follows:

> "2.2 The Halifax Central Business District shall be regarded as the principal business centre in the Halifax-Dartmouth region, and shall include office, shopping, finance, government, residential, recreation, and entertainment facilities as well as desirable types of harbour-related businesses and industries."

Policy 2.2.2 of Section II states that "Section III of this Plan details Policy 2.2 and shall constitute the basis for decision-making by the City in the Halifax Central Business District". The word "basis" is defined by the Oxford English Dictionary as "The main constituent, fundamental ingredient". This definition supports the opinion of the Board that the C.B.D. Policies and Objectives are the chief or principal ones to be applied in the City's decision-making in the C.B.D. but are not the only or exclusive ones.

As has already been noted in this decision, there is an onus on the Appellant to adduce evidence from which the Board could determine that the Council's decision cannot reasonably be consistent with the intent of the M.P.S.

After a careful review of the evidence adduced at the hearing and having perused the M.P.S. and viewed the subject site and the land in the vicinity of the subject site including the Citadel Hill and sub-area 3 and having perused the post-hearing submissions of counsel, it is the opinion of the Board that the Appellant has not discharged the onus on it of showing that the Council's decision not to enter into a development agreement with the Appellant "cannot reasonably be said to be consistent with the intent of the municipal planning strategy ---" within the meaning of Section 72(4) of the Planning Act. It is the opinion of the Board that the Council's decision is reasonably consistent with the intent of the M.P.S. notwithstanding that City Staff recommended approval of the project and a number of witnesses on behalf of the Appellant were of the opinion that the proposed development was not contrary to the intent of the M.P.S.

The Board in its determination that the Council's decision was reasonably consistent with the intent of the M.P.S. does so for four reasons, namely;

(1) the proposed development does not reasonably meet the intent of the M.P.S. because it does not comply with the provisions of Policy 2.2 of the C.B.D. Section III of the M.P.S. This policy states that "The City shall promote the development of mixed-use residential and commercial areas which are appropriate to the varied scale and character of the sub-areas of the C.B.D.".

The proposed development in making provision for a mixed residential and commercial use in the C.B.D. is commendable and is partly in accord with the provisions of Policy 2.2 of Section III of the M.P.S. Policy 2.2, however, requires the City to promote the development of mixed use residential and commercial areas "which are appropriate to the varied scale and character of the sub-areas of the C.B.D." (Emphasis added).

Since the subject site is situate within the boundaries of sub-area 3 of the C.B.D. which is bounded on the north by Sackville Street, on the west by Brunswick Street, on the east by a line midway between Argyle and Barrington Street from Sackville to Blowers Street and by Barrington Street between Blowers and Spring Garden Road, any new development on the site must therefore be appropriate to the varied scale and character of that sub-area.

As has already been stated sub-area 3 of the C.B.D. is an area identified in the M.P.S. as a "Cultural Area - a sub-area with an existing emphasis on cultural functions, including churches, the library, Neptune Theatre, small specialty shops".

From the evidence adduced at the hearing and from the Board's observations it is clear that sub-area 3 is an area of low-rise buildings containing cultural, commercial and institutional uses. The spires on the two church buildings, St. Mary's and St. David's appear to be the highest structures in the entire sub-area. To inject into this sub-area two high-rise buildings such as those proposed by the Appellant would not be appropriate to the varied scale and character of sub-area 3.

Most of the buildings in sub-area 3 do not exceed four storeys in height and would be overwhelmed by two very large buildings, 170' and 195' in height. The proposed buildings rather than being "appropriate" for this sub-area would dominate the sub-area and change its character.

(2) the proposed development does not reasonably meet the intent of the M.P.S. because it does not comply with the provisions of Policies 1.1 and 1.1.1 of Section III of the M.P.S. These policies read as follows:-

> "1.1 It shall be the City's policy to strengthen the development of the specific desirable characteristics of identified sub-areas of the CBD, as defined on Map 11 and in Schedule III.1 to provide the impetus necessary to ensure the viability of all parts of the CBD. The City shall accomplish the intent of this policy and all policies in Part II, Section III, Subsection 1 of this Plan, by Implementation Policy 3.5.
>
> 1.1.1 The City shall seek, encourage, and facilitate developments which respond positively to this concept and discourage those which respond negatively."

Reference has previously been made to the fact that the subject site lies within sub-area 3 of the C.B.D. By virtue of Policy 1.1 of Section III of the M.P.S. the City's Policy is to "strengthen the development of the specific desirable characteristics of identified sub-areas of the C.B.D. ---".

It therefore follows that the City's policy is to strengthen the specific desirable characteristics of sub-area 3. It is the Board's opinion that the M.P.S. does not clearly indicate what are the desirable characteristics of sub-area 3. Schedule III.1 in Section III of the M.P.S. sets out that the existing emphasis in this sub-area is "on cultural functions, including churches, the library, Neptune Theatre, small specialty shops" but it does not state that these are the desirable characteristics of this sub-area although this may be the case. The Board agrees with the observation of counsel for the City in his brief at page 15 where he states that "It is unclear whether the purpose of Schedule III.1 is merely to identify the sub-areas or whether it is intended to define the characteristics of the sub-area, and if the latter, whether the characteristics described are intended to be the specific desirable characteristics which are to be strengthened".

The City Council in rejecting the application did so for five reasons, number 2 of which is that "The development would not strengthen the desirable cultural uses in the C.B.D. sub-area 3, as set in Schedule III.1 and C.B.D. Economic Policies 1.1, 1.1.1, 1.1.2". The Council considered the application and formed the opinion that the proposed development would not strengthen the desirable cultural uses in sub-area 3. The Council's motion of rejection with its reasons is set forth in an extract from the minutes of the Council Meeting held on September 15, 1983 (item 112 of Exhibit A14). Council did not in its reason number 2 for rejection outline what Council considered were the desirable cultural uses which would not be strengthened. However, the Board did not hear any convincing evidence as to what the desirable characteristics of sub-area 3 are or evidence that the desirable characteristics (whatever they are) of this sub-area would be strengthened by the proposed development. Since it was not demonstrated to the Board that Council's reason number 2 was unreasonable in relationship to the intent of the M.P.S. the Board pursuant to the provisions of s.s.(4) of Section 72 of the Planning Act is obliged not to interfere with the Council's decision in rejecting the application based on Council's reason number 2.

(3) the proposed development does not reasonably meet the intent of Policies 5.2 and 7.3 of Section III of the M.P.S.

Policy 5.2 reads as follows:

> "5.2 The City shall continue to make every effort to preserve or restore those conditions resulting from the physical and economic development pattern of Halifax which impart to Halifax a sense of its history, such as views from Citadel Hill, public access to the Halifax Waterfront, and the street pattern of the Halifax Central Business District."

Policy 7.3 reads as follows:

> "7.3 The City shall prepare height and design criteria that reflect the relationship of Brunswick Street to the Citadel, and that maintain the quality of heritage buildings on Brunswick Street."

The Board is of the opinion that Brunswick Street is sensitive area due to its location as the western boundary of the C.B.D. and because it also forms the eastern boundary of the Citadel,an important historical land mark. Counsel for the Appellant acknowledged that this is a sensitive area in paragraph 1.06 of his Post Hearing Rebuttal Submission. This sensitivity is apparent from the wording of Policies 5.2 and

7.3 of Section III.

Policy 5.2 is a mandatory policy by which the City is committed to make "every effort" to preserve or restore those conditions which impart to Halifax a "sense of its history, such as views from Citadel Hill ----". Thus Policy 5.2 while it does not direct that the City should preserve all views from the Citadel does however indicate that views from the Citadel which impart to Halifax a sense of history are to be protected.

The proposed development clearly does not interfere with any of the City's view planes established under Section 25 of the City's Land Use By-law (formerly called the Zoning By-law). It appears clear that the City having adopted its view plane legislation did not intend to preserve a generally open panoramic view of the Harbour from Citadel Hill. However, one can readily ascertain from the wording of Policy 7.3 of Section III that the City has a concern over the height of buildings on the east side of Brunswick Street and this concern is probably related to the disruptive and possibly overwhelming effect on the general view from Citadel Hill which one or more tall buildings might create if located on Brunswick Street between the view planes. The issue then becomes one of trying to ensure that there is a level of harmony between the scale, mass and design of new buildings on the east side of Brunswick Street when large sections of that street elevation are seen as a whole from the Citadel.

The proposed development if constructed would in the opinion of the Board contravene the intent of Policy 5.2 of Section II of the M.P.S. as that Policy is interpreted in the light of the text of Policy 7.3 of Section III.

The Board agrees with that portion of the City Council's reason #4 that the development does not make every effort to preserve views from the Citadel Hill contrary to Objective 5 of Section II and Policy 5.2 of Section III.

Although Policy 7.3 of Section III is a mandatory policy requiring the City to prepare height and design criteria to reflect the relationship of Brunswick Street to the Citadel, the City has not in fact approved height and design criteria contemplated by Policy 7.3 although City Planning Staff on the directions of the Council did prepare in 1980 a draft Detailed Area Plan for the Brunswick Street area and recommended approval to Council. This draft plan contains height restrictions and accompanying the plan is a draft report entitled "Urban Design Guidelines for the Brunswick Street Area".

A copy of this document entitled "Draft Brunswick Street Detailed Area Plan" was filed as Exhibit # A32. While this draft plan has no legal validity it does express the considered opinion of the City's professional staff on a matter of such importance that the M.P.S. contains Policy 7.3 specifically directed to the matter of height and design criteria for Brunswick Street in its relationship to the Citadel. Certainly Policy 7.3 recognizes that there is a definite relationship between Brunswick Street and the Citadel and the relationship involves the height and design of buildings on Brunswick Street.

Whether one agrees or disagrees with the Draft Brunswick Street Detailed Area Plan prepared by the Planning Staff it was an important step in the direction of the City ultimately complying with the provisions of Policy 7.3.

The Board cannot emphasize too strongly the urgent need for the City to carry out as soon as possible the mandatory direction of Policy 7.3 of Section III of the M.P.S. by which the City has committed itself to prepare height and design criteria to "reflect the relationship of Brunswick Street to the Citadel and that maintain the quality of heritage buildings on Brunswick Street". The Board's opinion is that the City should clarify for prospective developers and citizens at large its criteria for development in this area.

(4) The Board is of the opinion that the proposed development does not meet the intent of Policy 7.2.1 of Section III of the M.P.S. Objective #7 reads:

> "A high quality of design and construction of buildings to reflect the architectural, heritage and topographical characteristics of the C.B.D."

Policy 7.2.1 expands in detail the intent of Objective #7 and reads as follows:

> "7.2.1 The exterior architectural design of new buildings should be complementary to any adjacent ones which are designated as being of historic significance or important to the character of the CBD; in such instances, the careful use of materials, colour, proportion, and the rhythm established by surface and structural elements should reinforce those same aspects of the existing buildings."

The Board is of the opinion that the proposed development does not meet the intent of Policy 7.2.1 of Section III because it is not complementary to the adjacent School Board Building and Welfare Building both of which have been designated as heritage buildings. These heritage buildings are constructed of red brick three stories high and would be completely overwhelmed by the relatively massive 170' and 195' towers proposed by the Appellant despite the efforts of the Appellant's architects to achieve some complementarity with the heritage buildings by creating a three storey brick facade on the office tower building. Notwithstanding this attempt to make the proposed development complementary to the heritage buildings the proposed development by its very size will be out of proportion to the adjacent heritage buildings.

The Board pursuant to s.s.(4) of Section 72 of the Planning Act is not prepared to interfere with the Council's decision for the reasons stated and disallows the appeal.

An order will issue accordingly.

DATED at HALIFAX, NOVA SCOTIA this 10th day of August A.D. 1984.

R H Blois

E A Lawrence

Daryl Wilson

Members of the Municipal
Board

Re M & H Realty Co. Ltd.

PLANNING--MUNICIPAL DEVELOPMENT PERMIT--REFUSAL TO ALLOW WAREHOUSE, OFFICE AND WHOLESALE SALES OUTLET--NON-CONFORMING USE--CHANGE IN USE--PLANNING ACT, Ss. 3(e), 76(1), 78(1),(3), 83(1), 85, 86, 87--MUNICIPAL BOARD ACT, S.27(3)

This is an appeal from a decision of the development officer for the City of Halifax who refused to issue a Municipal Development Permit to allow premises at 5655 Stanley St. to be used for a warehouse, office and wholesale outlet for the sale of architectural hardware. The subject property is zoned Residential (R-2) and the proposed use is commercial. The present use is a non-conforming one and includes in the building a small reception area, several small offices and a warehouse with two levels of storage space. It was used by Atlantic Sporting Distributors for the wholesaling and distribution of specialized sporting goods, and was zoned C-2 when purchased by Atlantic in 1977. In 1979, the zoning classification was changed from C-2 to R-2. In 1981 the property was sold to the Appellant and is presently subject to an agreement of purchase and sale, but will not close unless a municipal development permit for the proposed use is issued.

HELD--The appeal is allowed. The development officer is ordered to issue the municipal development permit.

The development officer was of the opinion that the Atlantic Sporting Distributors use and the proposed use are "two individual distinct uses" and that therefore the present non-conforming use could not be changed into the proposed use. The Board first notes that the proposed use would be an alteration in the present use and therefore the Appellant does require a municipal development permit. The sole issue then is whether the proposed non-conforming use is a change from the existing non-conforming use. This depends on the interpretation of the word "use" as found in s. 85(2) of the Planning Act, a word not defined in the Act. The development officer has interpreted the provision too strictly. If a use for the purposes of s. 85(2) refers to the specific activity and specific product or group of products existing when the by-law made the use non-conforming, it could lead to some unreasonable results and many properties would be unreasonably restricted in their usefulness. A person's interest in property should not be adversely affected by statute unless the statute clearly and unequivocally makes such a provision. Here the provision contemplates something more than just a change in the type of product being handled. Here the change in product will not result in a greater negative impact on the neighbourhood and this is the only alteration proposed. Here the present and proposed use are the same - as a warehouse, office and wholesale outlet - and so there is not a change but rather a continuation of the non-conforming use.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, S.N.S. 1983;

- and -

IN THE MATTER OF: An appeal by M & H Realty Company Limited from a decision of the Development Officer for the City of Halifax refusing the issuance of a Municipal Development Permit.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, Vice-Chairman
DARRYL W. WILSON, C.A., LL.B., Member

COUNSEL: ROBERT G. GRANT, LL.B., for the Appellant

WAYNE ANSTEY, LL.B., for the City of Halifax

DECISION

This is an appeal by M & H Realty Company Limited, the Appellant, pursuant to Section 78(1) of the Planning Act, c.9, S.N.S. 1983 from a decision of Boyd Algee, Development Officer for the City of Halifax, dated February 9, 1984, who refused the issuance of a Municipal Development Permit to allow the premises located at 5655 Stanley Street in the City of Halifax to be used for the purpose of a warehouse, office and wholesale outlet for the sale of architectural hardware.

The Notice of Appeal, which was not dated, was received by the Board on February 16, 1984. The grounds for appeal as set out in the Notice of Appeal are as follows:

> "1. That the development officer erred in law and misinterpreted the provisions of s.85(2) of the Planning Act; and
>
> 2. That the development officer erred in law and misinterpreted the provisions of the land-use by-law in refusing to issue the municipal development permit requested by the Appellant."

The hearing of the appeal took place in the Boardroom of the offices of the Expropriations Compensation Board, Suite 904, 1660 Hollis Street, Halifax, Nova Scotia on April 3, 1984. At the commencement of the hearing, Counsel for the Appellant filed with the Board an Affidavit of Service of Notice of Hearing. Counsel for the City and the Appellant were in agreement that the appeal was properly before the Board and the Board assumed jurisdiction to hear the appeal on its merits. Subsequent to the hearing, Counsel submitted written briefs, the last of which was filed with the Board on April 18, 1984.

Evidence at the hearing was given by Michael Walsh, President and majority shareholder of the Appellant, Annette Armitage, an employee of E.C. Armitage Holdings Limited, which is owned by her father, E.C. Armitage and Peter Newbould, Coordinator of Municipal Planning with the Community Planning Division of the Department of Municipal Affairs, on behalf of the Appellant and Boyd Algee on behalf of the City. Also appearing and giving evidence pursuant to Section 27(3) of the Municipal Board Act, S.N.S. 1981, c.9, were Mr. Herb Stevens and Mrs. Jean Stevens, who reside at 5664 Columbus Street. Their property is located to the north of and abuts the subject property. Section 27(3) of the Municipal Board Act reads as follows:

> "Any person may appear and give evidence on any matter before the Board, but may not participate in the hearing except as permitted by the Board."

The facts are not in dispute.

On February 2, 1984, the Appellant made application on behalf of E.C. Armitage Holdings Limited for a Municipal Development Permit to allow the property located at 5655 Stanley Street in the City of Halifax to be used by E.C. Armitage Hardware Company Limited, hereinafter referred to as Armitage Hardware, as a wholesale outlet for the warehousing and sale of architectural hardware with an office ancillary to the wholesale operation. Armitage Hardware is a subsidiary of E.C. Armitage Holdings Limited. The application was refused by the development officer based on Section 85(2) of the Planning Act which reads as follows:

> "A non-conforming use shall not be changed to any other use unless the use is permitted for that property by the land-use by-law."

The use of the subject property by the Appellant at the time of its application was a non-conforming use. The proposed use by Armitage Hardware is not a permitted use under the provisions of the City's Land-use By-law as the subject property is zoned Residential (R-2) and the proposed use is a commercial use.

The building located at 5655 Stanley Street includes a small reception area, several small offices and a warehouse with two levels of storage space. The subject property was purchased from Halifax Hydraulics Limited in August 1977 by Atlantic Sporting Distributors Company Limited hereinafter referred to as Atlantic Distributors. The majority shareholder of Atlantic Distributors is Michael Walsh. Atlantic Distributors spent approximately $30,000.00 to improve the condition and appearance of the exterior and interior of the subject building. Atlantic Distributors used the building as an office and warehouse for the wholesaling and distribution of specialized sporting goods. Retail sales of sporting goods occurred as a result of referred business from Atlantic Distributors' retail customers but it amounted to only 5% of total company sales and was neither advertised nor encouraged by Atlantic Distributors.

The subject property was zoned C-2 at the time it was purchased by Atlantic Distributors in 1977. The C-2 zoning classification provided, then and now, for the following uses:

> "(a) R-1, R-2, R-3 and C-1 uses as hereinbefore set out;
>
> (b) any business or commercial enterprise except when the operation would cause a nuisance or a hazard to the public and except adult entertainment uses and amusement centres;
>
> (c) billboards not to exceed twenty-eight square meters (28 m^2) in area and not to extend more than eight meters (8 m) above the mean grade on which it is situated."

The use made of the property by Atlantic Distributors at the time of its purchase was a permitted use under the then existing C-2 zoning classification.

On May 31, 1979, the zoning classification of the subject property was changed from C-2 to R-2. Atlantic Distributors opposed the proposed change in the zoning classification in a letter to City Council but it did not appeal the decision of

Council to amend the zoning by-law which changed the zoning classification of the subject site. The R-2 zoning classification permits only medium density residential development. The change in zoning classification made the use of the subject property by Atlantic Distributors a legal, non-conforming use.

On May 15, 1981, Atlantic Distributors transferred title to the subject property to the Appellant. Michael Walsh is the majority shareholder of both companies. Atlantic Distributors continued to occupy the subject property under lease from the Appellant.

On October 4, 1982, Atlantic Distributors was placed in receivership by the Bank of Montreal. The receiver sold Atlantic Distributors' inventory to Crew Sales Limited, of Liverpool, Nova Scotia. Crew Sales Limited rented the subject property from the Appellant for the purpose of selling the inventory it purchased from the receiver. The inventory of sporting goods not sold by Crew Sales Limited was removed from the subject building in March or April of 1983.

The Appellant purchased the equipment and some of the inventory of Atlantic Distributors from the receiver with the intention of starting a new business. The subject property has been used since March, 1983 to store the furniture and appliances purchased by the Appellant from the receiver; to sell the small amount of inventory purchased from the receiver; to store damaged wings from airplanes purchased by Michael Walsh for resale and to store duck boats manufactured by Toller Enterprises Ltd., another company operated by Michael Walsh.

In September 1983, the Appellant entered into an agreement of Purchase and Sale for the subject building with E.C. Armitage Holdings Ltd. The sale was not concluded because officials of the City of Halifax indicated that the City would not issue a municipal development permit to allow E.C. Armitage Holdings Limited to use the subject property as an office, warehouse and wholesale outlet for the sale of architectural hardware by one of its subsidiary companies, Armitage Hardware. The sale of the subject property will be completed if the Appellant is successful in obtaining a municipal development permit to allow the intended use of E.C. Armitage Holdings Limited.

Armitage Hardware presently carries on business as a wholesaler of architectural hardware at 3270 Isleville Street in the City of Halifax which is located immediately adjacent to and east of the subject property. The building located at 3270 Isleville Street was a home which was converted to an office use. Entrance to the building is from Stanley Street. Armitage Hardware employs nine persons and its present location is very crowded. It needs the subject property to provide more office and warehouse space as well as better receiving and shipping facilities for its operation. Armitage Hardware does not intend to expand its business if it acquires the subject property.

Armitage Hardware obtains contracts by bidding pursuant to tenders called by its clients through the Construction Association of Nova Scotia. Its clients include architects, general contractors and government departments and agencies. Like Atlantic Distributors, retail sales by Armitage Hardware amount to about 5% of total sales volume and are neither advertised nor encouraged. Any retail business it does is referred by its wholesale clients.

The business of both Atlantic Distributors and Armitage Hardware involves the receipt of merchandise in cartons and cardboard boxes and the delivery or shipping of the merchandise in cartons and cardboard boxes. The traffic generated by both businesses is moderate.

Mr. & Mrs. Stevens were concerned about the level of commercial activity in their neighbourhood which is zoned for residential purposes although a number of commercial uses are in effect, the noise and traffic congestion caused by the commercial activity and the unsightly premises of some of the commercial properties. Mr. Stevens acknowledged that the main source of the noise and unsightly premises is the property occupied by Standard Paving Limited located west of the subject property on Stanley Street and not the subject property. He was concerned that there might be some further expansion of the subject property. Mrs. Stevens said the residents in the area of the subject site support the decision of the development officer. She also stated that the residents have been fighting to rid the area of commercial activity for a long time.

In the opinion of Mr. Algee, the current use by Atlantic Distributors and the proposed use by Armitage Hardware are "two individual distinct uses". Mr. Algee stated that whereas the former Planning Act allowed the exchange of non-conforming uses in the same use classification under the Zoning By-law, the current Planning Act provides in Section 85(2) that a non-conforming use can't be changed to another use unless permitted by the Land Use By-law. In Mr. Algee's opinion, the present Planning Act provisions relating to non-conforming uses are more restrictive than the former Planning Act provisions. Mr. Algee said that after reviewing the Land-Use By-law he could not categorize the use of the subject property. In his opinion Section 85(2) restricted the use of the subject property to its specific use as a warehouse, office and wholesale outlet for the sale of sporting goods. He further stated that development officers are not trained in planning matters and cannot weigh the impact of a proposed change in use of property on a neighbourhood until the use is in place. On cross-examination Mr. Algee said that he was not contesting whether there was a discontinuation of the existing non-conforming use of the subject property. Mr. Algee also said that if the Appellant's application had been received pursuant to the provisions of the former Planning Act he would have granted the municipal development permit. He also stated that in determining what constitutes the use of the subject property for purposes of Section 85(2), he did not look at the intended use of the subject property when it was purchased by Atlantic Distributors.

According to Peter Newbould, in attempting to define the word use as it appears in Section 85(2) it is appropriate to refer to the provisions of the City's Land Use By-law. The C-2 zone of the Land Use By-law for the City of Halifax includes as an allowable use "any business or commercial enterprise". According to Mr. Newbould, this phrase gives little direction as to what a particular use ought to be for the purposes of the non-conforming use provisions of the Planning Act and therefore a consideration of the Land Use By-law does not help in determining whether there has been a change of use in this instance. In his opinion, to determine what constitutes a "use" for purposes of Section 85(2) in this particular instance it is necessary to look at planning principles.

Mr. Newbould would look at the dominant use characteristics of the subject building and how they impact on adjacent properties. Mr. Newbould considered the dominant use of the subject building to be warehousing with wholesale activity. According to Mr. Newbould the type of visits to the subject site, the method of delivery of merchandise and the number of people going to the subject site will not change under the proposed use. In his opinion the only difference between the proposed use and the current use of the subject building is the articles warehoused. In his opinion the non-conforming use will not be changed because the basic activity within the structure will not be changed.

Section 76(1) of the Planning Act provides as follows:

> "76(1) Where a council has adopted a land-use by-law, a municipal development permit shall be required before any development is undertaken, but the by-law may specify developments for which no municipal development permit is required."

The word "development" is defined in Section 3(2) of the Act as follows:

> "3(e) "development" includes any erection, construction, alteration, replacement or relocation of or addition to any structure and any change or alteration in the use made of land or structures;"

Counsel for the Appellant in his pre-hearing brief referred to the following definition of the word "alter" found in the

Living Webster Dictionary of the English Language.

> "To make over or different; to make some change in; to modify; to vary in some degree without an entire change."

In the opinion of the Board, the proposed use of the subject building by E.C. Armitage Holdings Limited would be an alteration in the present use of the subject property. Therefore, in the opinion of the Board, the Appellant requires a municipal development permit in order to proceed with the proposed use of the subject property by E.C. Armitage Holdings Limited.

Section 78(3) sets forth the Board's powers on an appeal from a decision of the development officer relating to non-conforming uses and it reads as follows:

> "78(3) The Board shall
>
> (a) confirm the decision of the municipal development officer; or
>
> (b) allow the appeal by ordering that the permit be granted but no permit shall be granted that is inconsistent with the land-use by-law, an agreement entered into pursuant to Section 55 or 56, or a provincial land-use regulation."

Both counsel raised the question whether the Board can grant relief pursuant to Section 78(3)(b) if the proposed use is inconsistent with the City of Halifax's Land Use By-law. The Land Use By-law for the City of Halifax does not state that its provisions are subject to the non-conforming use provisions of the Planning Act. Section 83(1) of the Planning Act reads as follows:

> "83(1) Subject to this Act, a non-conforming structure or a non-conforming use of land or a structure, existing at the date of the first publication of the notice of intention to adopt a land-use by-law or amend or revise a land use by-law may continue to exist."

A similar issue was considered by the Provincial Planning Appeal Board in the case of Dartmouth Salvage (1978) Ltd., Planning Appeal

Board Decisions, Volume 11, Page 1601. That appeal was heard under the provisions of the former Planning Act S.N.S. 1969, c. 16 as amended. That board concluded that a continuation of a use which may not be in conformity with the zoning by-law but which is a legal non-conforming use could not be prevented under the guise of the then Planning Act, which stated "no Development Permit shall be issued that is not in conformity with the zoning by-law".

In the opinion of the Board where there is an inconsistency between the provisions of the Planning Act and the provisions of a Land Use By-law, the Planning Act provisions take precedence. In the opinion of the Board, Section 78(3)(b) of the Planning Act is qualified by Section 83(1) of the Act and the Board's power to allow the appeal pursuant to Section 78(3)(b) is not restricted by the words "but no permit shall be granted that is inconsistent with the Land Use By-law" if it determines that the proposed use is a continuation of the existing non-conforming use.

The sole issue in this appeal is whether or not the non-conforming use proposed for the subject building by Armitage Hardware is a change from the existing non-conforming use of the subject property by the Appellant. Whether or not the warehousing and wholesaling of architectural hardware by Armitage Hardware constitutes a change by the Appellant depends on the interpretation of the word "use" as found in Section 85(2). The word "use" is not defined in the Planning Act.

Counsel for the Appellant submits that the nature and character of the proposed use of the subject building by

E.C. Armitage Holdings Ltd. and the current use by the Appellant are essentially the same. Counsel for the Appellant submits that the subject building has been used by Atlantic Distributors and the Appellant for the last seven years as an office, warehouse and wholesale outlet and the proposed use by E.C. Armitage Holdings Ltd. will be as an office, warehouse and wholesale outlet. There will be no alteration in the design of the subject building to accommodate the proposed use. According to Counsel for the Appellant, the only difference between the previous use of the building and the proposed use of the building is that the product warehoused and sold will be altered from sporting goods to architectural hardware. Counsel for the Appellant also argues that the proposed use of the subject property when compared with the existing use, will not result in a more intensive use of the subject building and will not create additional demands such as increased traffic, noise or pollution on the neighbourhood. Further, Counsel for the Appellant submits that since the subject building is only capable of being used as a warehouse with office space ancillary thereto, a narrow interpretation of the word "use" would result in the forfeiture of the Appellant's property rights in the subject building and render useless a building which was designed, constructed and intended to be used as a warehouse.

Counsel for the City submits that the intention of Section 85(2) is to restrict the use of non-conforming premises to their specific non-conforming uses at the time of the enactment of the land use provisions which makes them non-conforming. According to Counsel for the City the specific use of the subject property is a warehouse, office and wholesale outlet for the sale of specialized sporting goods. Counsel for the City referred the Board to Section 47(2) of the former Planning Act, supra, which states;

> "47(2) Where the existing use of a building does not conform to the zoning by-law such use may be changed to a use of the same use classification under the zoning by-law."

Counsel for the City argues that when Section 85(2) of the present Act is compared with Section 47(2) of the former Act, Section 85(2) is more restrictive in its wording which suggests that an owner of property under the present Act is more limited in his ability to deal with the non-conforming property.

Counsel for the City also referred the Board to the following comments of the Planning Act Review Committee concerning non-conforming uses. At page 67 of its interim report issued in November 1980 the Planning Act Review Committee stated:

> "A number of submissions felt that provisions in the Act which allow a non-conforming use to be changed to any use of the "same use classification" encourage the perpetuation of non-conforming uses. Others were not sure what 'same use classification' referred to.
>
> The Committee recommends that the Act permit only the existing specific use of land, buildings, or structures to continue, unless otherwise set out in a municipal planning strategy." (emphasis added)

At pages 29 and 30 of its final report issued in November 1981 the Planning Act Review Committee states:

> "The Planning Act should provide councils with certain options on how to deal with non-conforming uses and buildings.

> Whether non-conforming uses should be restricted or terminated under certain circumstances, or whether they should be permitted to expand and recommence after damage or discontinuance, should be the decision of council. However, the manner in which council deals with non-conforming uses must be based on explicit planning policies set out in an approved municipal planning strategy.
>
> The Planning Act should permit only the existing specific non-conforming use to continue, unless otherwise set out in a municipal planning strategy."

Counsel for the City argues that Section 85(2) and Section 87 of the present Planning Act were intended to carry out the above recommendations of the Planning Act Review Committee.

Section 87 reads as follows:

> "87(1) A municipal planning strategy may provide for the variation of the provisions of Section 85 or 86, but no variation shall increase the restrictions in Sections 85 and 86.
>
> (2) The policies adopted pursuant to subsection (1) may provide for
>
> (a) the extension, enlargement or alteration of non-conforming structures or structures containing non-conforming uses;
>
> (b) the extension of a non-conforming use of land;
>
> (c) the rebuilding of a non-conforming structure, or structures containing a non-conforming use, after destruction;
>
> (d) the recommencement of a non-conforming use of land or a structure after it has been discontinued for a continuous period in excess of six months.
>
> (3) The policies adopted pursuant to this Section may be carried out through the land-use by-law, or by development agreement, and where the council has provided for the latter, Sections 66 to 73 apply mutatis mutandis to any agreement entered into pursuant to this Section."

Counsel for the City submits that Section 85(2) permits only the specific non-conforming use to continue and Section 87 gives the municipal council the right to provide for policies in their municipal planning strategy dealing with non-conforming uses. Counsel for the City submits that Section 85(2) be given the strictest possible interpretation in order that the widest range of options are available for adoption by a municipal council when dealing with non-conforming uses in their municipal planning strategies. Counsel for the City argues that since the municipal planning strategy of the City of Halifax has not been amended to provide for flexibility in dealing with non-conforming uses and the proposed use by Armitage Hardware is not permitted by Section 85(2), the development officer was justified in refusing a municipal development permit to the Appellant.

Counsel for the City further submits that since a Land Use By-law is intended to be administered with a certain degree of exactitude rather than by an exercise of professional judgement it is reasonable to conclude that Section 85(2) is to be given a strict interpretation and that no change from the specific non-conforming use is to be permitted unless the municipal planning strategy provides otherwise or unless the proposed use conforms with the Land Use By-law.

Counsel for the City also submits that if a development officer can't look to the Land Use By-law for a definition of a particular use for purposes of the non-conforming use provisions of the Planning Act, it is extremely difficult to identify and categorize the exact land use. Counsel for the City argues that most of the development officers in the Province of Nova Scotia are not planners and therefore may not be able to make the kind of judgement which Mr. Newbould suggests may have to be made when confronted with a proposed change to an existing non-conforming use.

In reply to arguments of Counsel for the City, Counsel for the Appellant submits that Sections 85 and 86 of the Planning Act represent the minimum statutory accommodation for the continuation of non-conforming uses and Section 87 allows municipalities to extend the legal non-conforming use provisions in its Land Use By-law beyond the statutory minimum.

Sections 85 and 86 of the Act read as follows:

> "85(1) No increase in volume of or any addition to a structure shall, except as required by an enactment, be made while a non-conforming use therein is continued, but such use may be extended through the structure.
>
> (2) A non-conforming use shall not be changed to any other use unless the use is permitted for that property by the land-use by-law.
>
> (3) A change of tenant, occupancy or owner of any land or structure shall not of itself be deemed to affect the use of the land structure for the purposes of this Section.
>
> (4) Subject to Section 86, this Act does not preclude the repair or maintenance of a structure.
>
> 86(1) If a non-conforming structure or a structure containing a non-conforming use is destroyed or damaged by fire or otherwise.
>
> (a) to an extent of less than seventy-five per cent of the market value of the structure, it may be rebuilt, repaired or re-occupied if the structure is substantially the same as it was before the destruction or damage and it is used for the same non-conforming use; or
>
> (b) to an extent of seventy-five per cent or

> more of the market value of the structure, it shall not be rebuilt, repaired or re-occupied except in conformity with the requirements of the land-use by-law applicable to the property.
>
> (2) A non-conforming use of land or a structure shall not be recommended if it has been discontinued for a continuous period of six months, and in such event the land or structure shall not thereafter be used except in conformity with the requirements of the land-use by-law applicable to the property."

Counsel for the Appellant submits there is a distinction between the phrase "an alteration in use" and the phrase "a change in use". An alteration in use and a change in use are referred to in Section 3(e) of the Planning Act as part of the definition of the word "development". Section 85(2) which relates to non-conforming uses, states that "a non-conforming use shall not be changed to any other use". The word alteration is not mentioned in Section 85(2). Counsel for the Appellant submits that if the City's interpretation of the phrase "changed to any other use" as found in Section 85(2) is correct then it would be difficult to contemplate a situation where a change in use would not also amount to an alteration in use. Counsel for the Appellant suggests that the proposed use by Armitage Heritage is at most an alteration in the use of property and not a change in use.

Counsel for the Appellant also submits that because the development officer is required to exercise discretion in the administration of the land use by-law is not a reason for refusing the issuance of municipal development permit. Counsel for the Appellant argues that a development officer is required to exercise discretion in other matters when administering a land use by-law. Counsel for the Appellant further submits that any variation in a municipal planning strategy and land use by-law to allow for the extension of a non-conforming use will involve the exercise of discretion by the development officer.

In the opinion of the Board, the development officer has interpreted too strictly the phrase "a non-conforming use shall not be changed to any other use" found in Section 85(2) of the Planning Act. If, as he suggests, a use for purposes of Section 85(2) refers to the specific activity and specific product or group of products existing at the time of the enactment of the land use by-law which made the use non-conforming, Section 85(2) could lead to some unreasonable results. For example, a non-conforming property used for the retailing of vegetables could not be used for the retailing of fruit. In the opinion of the Board many properties would be unreasonably restricted in their usefulness if their use for purposes of Section 85(2) is confined solely to the group of products handled at the time of enactment of the land use by-law which made their use non-conforming.

The Board is of the opinion that a person's interest in property should not be adversley affected by statute unless the statute clearly and unequivocally makes such a provision. In the opinion of the Board, Section 85, 86 and 87 of the Act do not make it clear that a non-conforming use refers to the specific activity and specific product line being handled at the time the use was made non-conforming.

In the opinion of the Board, the wording "a non-conforming use shall not be changed to any other use" contemplates a change in use which involves something more than just a change in the type of product being handled. The Board agrees with Mr. Newbould that the basic activity within the subject property is as a warehouse, office and wholesale outlet. The change in the product being warehoused and sold will not create any additional demands on the building and it will not result in a greater negative impact on the neighbourhood than the existing product line. In fact, if the Appellant began wholesaling architectural hardware from the subject building in place of sporting goods, it is doubtful if the City or the neighbours would be aware of the change in goods being warehoused. In the opinion of the Board the only alteration proposed for the subject building is the type of product being warehoused and sold.

Even if the Board agreed with the submission of Counsel for the City that Section 85(2) should be interpreted strictly in order that Council has the widest range of options available for adoption when dealing with non-conforming uses in its Municipal Planning Strategy, the interpretation of Section 85(2) put forward by the development officer which would identify a use of property for purposes of Section 85(2) on the basis of the products being handled is in the opinion of the Board too strict an interpretation of the word "use".

In the opinion of the Board the subject building is being used as a warehouse, office and wholesale outlet and the proposed use of the building is as a warehouse, office and wholesale outlet. In the opinion of the Board, the proposed use of the subject building is not a change in the existing non-conforming use of the subject property but a continuation of the non-conforming use.

The Board pursuant to the provisions of Section 78(3)(b) of the Planning Act allows the appeal and orders that the development officer for the City of Halifax grant a municipal development permit to E.C. Armitage Holdings Company Limited to allow the premises located at 5655 Stanley Street in the City of Halifax to be used for the purposes of a warehouse, office and wholesale outlet for the sale of architectural hardware as a continuation of the existing non-conforming use.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 29th day of August, A.D., 1984.

Blois

R.H. BLOIS, Chairman

Lawrence

ELIZABETH LAWRENCE
Vice-Chairman

Wilson

D.W. WILSON, Member

Re Genevra Calvi

PLANNING--ZONING--AMENDMENT--RURAL RESIDENTIAL AND AGRICULTURAL (R-4) TO LIGHT INDUSTRY (M-1)--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--PLANNING ACT, Ss. 63(1),(3),(5)--TOWN OF PICTOU MPS, Policies C-2, C-3, C-6, O-7

This is an appeal by an adjacent landowner from a decision of the Town of Pictou rezoning 1.38 ac. of land from Rural Residential and Agricultural (R-4) to Light Industry (M-1). The request to rezone was made to allow the site to be used for a ready-mix concrete plant. The subject site is about 250' by 250', lies between the Trans Canada Highway 106 and Route 376 and is about 1,000' from the Pictou Rotary. It was formerly used for oil storage by Imperial Oil Limited, but that use, which had become non-conforming, was discontinued. Staff recommended against the rezoning, believing that the MPS policies indicated this use should be located in the new Industrial Park.

HELD--The appeal is allowed and the decision of Council reversed.

Section 63(5) of the Planning Act clearly states that the Board "shall not allow the appeal unless the Board determines that the decision of the Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy". In this appeal the Board accepts the argument of the Appellant and the evidence of the planner that Council's decision did not reasonably carry out the intent of the Town's MPS. The two most important policies are C-2 and C-3. Here Council's decision neither promotes the Industrial Park nor assists it to "become the major focus of new or additional industrial development within the Town" as Policy C-2 requires. Instead the decision disperses new industrial development. Policy C-3 does allow the location of industrial uses outside the Industrial Park if "the proposed use is site oriented and must utilize the proposed site" or "suitable land was not available in the Industrial Park". A business involving the transportation of materials by truck and the receiving of supplies by truck is not a site oriented use which must be located near the highway. This is too wide an interpretation and any manufacturing or warehouse operation would meet it, negating the intent of Policy C-2 to "promote the new Industrial Park". As to whether suitable land was available in the Industrial Park, the Town argued that this included, by analogy to the reference to "suitability" in Policy O-7 dealing with zoning amendments, the steepness of grades. The Board disagrees. Furthermore, this reference is to the grade of the site, whereas what Council had considered in its decision was the steepness of grade of the roads in the vicinity of the Industrial Park. While the site's previous industrial use for oil storage for about 18 years was a factor in Council's decision, this was a non-conforming use and just two years previously Council had reconfirmed its intent that the subject property and surrounding area should remain residential and agricultural. Council's decision to allow the proposed industrial use is a spot rezoning which does not reasonably carry out the intent of the MPS.

NOTE: 1. Extensive evidence was given by the Mayor and members of Council as to why they voted for or against the rezoning.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, S.N.S. 1983, as amended;

- and -

IN THE MATTER OF: An appeal by GENEVRA CALVI from a decision of the Council of the Town of Pictou made January 23, 1984 which rezoned 1.38 acres of land located south of the West River Road from Rural Residential and Agricultural (R-4) Zone to Light Industry (M-1) Zone.

BEFORE: ELIZABETH LAWRENCE, Vice-Chairman

COUNSEL: GENEVRA CALVI, without Counsel, appearing on her own behalf.

E. ANNE MACDONALD, LL.B., for the Town of Pictou.

DECISION

The Appellant, Mrs. Genevra Calvi, filed a Notice of Appeal dated January 27, 1984, which was received by the Board January 30, 1984, pursuant to Section 63(1) of the Planning Act, appealing a decision of the Council of the Town of Pictou made January 23, 1984, which rezoned 1.38 acres of land located south of the West River Road between Route 376 and Trans Canada Highway 106 in the Town of Pictou, from Rural Residential and Agricultural (R-4) Zone to Light Industry (M-1) Zone.

The decision of Council of January 23, in addition to approving the rezoning of the subject site from R-4 to M-1 also approved "proposed amendments to the Zoning By-law" as stated in the resolution recorded in the minutes of the meeting of Town Council, filed as Exhibit C-5. The effect of the amendments was to make the proposed use of the subject property an allowable use in the M-1 Light Industry Zone. The Appellant did not appeal the amendments to the Zoning By-law but only the rezoning of the subject property from R-4 Rural Residential and Agricultural Zone to M-1 Light Industry Zone.

The appeal was heard April 12, 1984, in the Council Chambers of the Town of Pictou.

By sworn testimony the Appellant stated that she had notified all those persons whom the Board directed be notified, and that the approved Notice of Hearing had been published in the Pictou Advocate March 21 and 28 and April 4, 1984.

The property of the Appellant fronts on Route #376; her house is approximately 570 feet from the subject property.

Both parties agreed that the appeal was properly before the Board and the Board proceeded to hear the appeal on the merits.

The subject property contains 1.38 acres. It has 250 feet of frontage on the south side of the West River Road and is 250 feet in depth. It lies between the Trans Canada Highway 106 and Route 376. The Pictou rotary is approximately 1,000 feet by road to the northeast. The property was used formerly by Imperial Oil Limited for oil storage. It was conveyed by Imperial Oil to Kenneth R. Grant of Welsford, Pictou County on January 27, 1983 and subsequently conveyed by Kenneth R. Grant to Kenneth R. Grant and Brian Clarke Construction Limited of the Town of Pictou on February 9, 1983. At the time that the property was conveyed by Imperial Oil to Kenneth Grant there were no longer oil storage tanks on the property.

The subject property was zoned Residential - Agricultural from 1966 until the approval by the Minister of the current Zoning By-law on March 31, 1982. The use of the property for oil storage was a non-conforming use under both the Residential - Agricultural Zone prior to March 31, 1982, and under the subsequent Rural Residential and Agricultural (R-4) Zone. The oil storage tanks were removed on or about the same time as the R-4 Zone came into force. Pursuant to Section 47(5) of The Planning Act, Ch. 16, S.N.S. 1969, the subject property lost its non-conforming status six months after the discontinuance of the oil storage use.

The request to Town Council to rezone the subject property from Rural Residential and Agricultural (R-4) Zone to Light Industry (M-1) Zone was made by Mr. Bert Kelderman, the owner of Kelderman Concrete, in order to construct and operate a ready-mix concrete plant on the site.

The Appellant, in her Notice of Appeal (Exhibit C-1) states, "The grounds for this appeal are: Pictou Town Council has not proved that suitable land was not available in the Industrial Park adjacent to the Old Haliburton Road, as stated by Policy C-3 of the Municipal Development Plan of the Town of Pictou".

Section 63(3) of the Planning Act, Chapter 9, S.N.S. 1983, states:

> "The Board shall determine whether the decision of the council reasonably carried out the intent of the municipal planning strategy."

and further in Section 63(5):

> "The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

The Appellant called John Merrithew, a planner with the Pictou County District Planning Commission, as her only witness. Counsel for the Town called 10 witnesses, including Mr. Merrithew.

Mr. Merrithew reviewed the undated "Technical Report" (Exhibit C-6) prepared by him for the Planning Advisory Committee (PAC). Minutes of the PAC meeting of January 11, 1984 at which it was discussed are contained in a packet of material (Exhibit C-9) containing information on the rezoning application for the subject property.

Mr. Merrithew outlined the policies in the Municipal Planning Strategy (MPS) for the Town of Pictou relating to industrial development and the industrial use proposed for the subject site. The following are the relevant policies in his opinion:

> "C-2 It shall be the intention of Council to promote the new Industrial Park located adjacent to the Old Haliburton Road. This Industrial Park will become the major focus of new or additional industrial development within the Town.
>
> C-3 Notwithstanding Policy C2, it shall be the intention of Council to allow industrial uses to locate outside the two designated areas under the following conditions:
>
> (a) that the proposed use is site oriented and must utilize the proposed site - e.g., boat building facility, or;
>
> (b) that suitable land was not available in the

> Industrial Park, adjacent to the Old Haliburton Road.
>
> C-6 It shall be the intention of Council to require where possible that industrial development be serviced with town water and sewer."

The concluding recommendation in Mr. Merrithew's technical report states:

> "The intent of the Municipal Development Plan [now called the Municipal Planning Strategy] is to encourage new industries to locate in the Industrial Park. Only if an industry is "site specific", or if land in the Park is unsuitable could an industry locate elsewhere. There is sufficient land in the Industrial Park to accommodate the concrete plant; there is also a better opportunity for the provision of municipal services (connection to which is encouraged in the MDP). The only negative feature of the Park as far as the proposal is concerned is the greater distance the trucks would have to travel to get to the Trans Canada Highway (5000 feet compared to 1000 feet from the proposed location) and it is staff's opinion that travelling a distance of less than 1 mile will not have a significant impact on the business.
>
> Although the proposed location of the concrete plant is acceptable from a planning perspective, Council must consider the intent and policies of the MDP. Staff's interpretation of the MDP leads us to believe that the granting of this rezoning would violate the overall intent of the Plan because of the availability of suitable land in the Industrial Park. Unless additional reasons can be identified which indicate the land in the Industrial Park is unsuitable, staff feels Council should deny this application."

Mr. Merrithew stated that there were 95 acres unused in the Industrial Park, 12 acres of which are useable with minor improvements such as grading or tree clearing. In Mr. Merrithew's opinion a site in the Industrial Park could be more easily serviced with town water than the subject site which lies across the Trans Canada Highway and is more distant from the existing water line, which lies along the Haliburton Road.

The subject site as well, he said, was visible from the Trans Canada Highway, from all parts of the Pictou Rotary and from the Lyons Brook Road, whereas the Industrial Park was hidden somewhat from full traffic view by its location on the Haliburton Road. Mr. Merrithew agreed that it was "wasteful" to open up new industrial areas without using existing industrially zoned areas.

Mr. Merrithew expressed the opinion that the rezoning of the subject property to Light Industry (M-1) Zone would have an influence on the value of the remaining 54 acres more or less located in the area bounded by the Haliburton Road, Trans Canada Highway 106 and Route 376. He felt that the rezoning of the subject property to M-1 would have a de-valuing effect on the adjacent lands for residential uses but would increase the value of the lands in the area for industrial and commercial uses.

In cross-examination Mr. Merrithew agreed that the phrase "suitable land" in Policy C-3(b) was not defined in the Municipal Planning Strategy. In his opinion it was up to Council to determine adequate criteria by which to measure whether or not "suitable land" was unavailable in the Industrial Park so that Council could allow industrial uses to locate outside the two areas in the Town designated for industrial uses, as provided for in Policy C-3(b).

Condition (a) in Policy C-3 Mr. Merrithew felt did not apply to the proposed use for the subject property. If gravel for the concrete plant was extracted at the site he stated that the proposed site could be considered "site oriented". A ready-mix plant, however, that trucked raw material from other locations as is proposed by the applicant was not site specific in his opinion.

Mr. Vance McLeod, Senior Development Officer with the Pictou County Planning Commission gave evidence on the application for rezoning and the amendments to the Zoning By-law which were ancillary to the rezoning. The amendments which were approved by Council at the same time as the zoning of the subject property was changed from R-4 Rural Residential and Agricultural to M-1 Light Industry were the following:

1. Added to Section 21(1)(f) of the "General Provisions for all Zones," the words "except in an industrial zone":

   Accessory Buildings

   "21(1) Accessory uses, buildings and structures shall be permitted in any zone within the Town of Pictou but shall not:

   (f) exceed 750 square feet in total floor area except in an industrial zone;"

2. Deleted from Part 9, Table 1 (Light Industry M-1 Zone) the words "but by excluding the bulk storage of sand or gravel" from one of the allowable uses in the zone which read formerly "Building Supply and Equipment Depots but by excluding the bulk storage of sand or gravel".

3. Add to the allowable uses in Part 9, Table 1 (Light Industry M-1 Zone) - "Commercial uses which are accessory to the permitted industry and subject to the requirements of Part 5, Section 21".

Mr. McLeod stated that to his knowledge all procedures involved in this rezoning were properly carried out.

Mr. Harry Hopkins, Town Engineer for the Town of Pictou since 1976 gave evidence on the sewer and water services available in the area of both the Industrial Park and the subject property. Neither the Industrial Park nor the subject property are currently serviced with water or sewer. Mr. Hopkins stated that water was available and that both areas could be serviced by extending the watermain which currently ends on Haliburton Road approximately 800 feet from the subject site. Mr. Hopkins believed that the subject property when owned by Imperial Oil had a water supply from a well on site. Both the subject property and a site at the Industrial Park would need on site sewage disposal according to Mr. Hopkins.

Mr. Bert Kelderman, proprietor of Kelderman Concrete, who resides in Bayview in Pictou County and currently operates his ready-mix concrete business from his home property, gave evidence on his application for the rezoning of the subject property. Mr. Kelderman stated that he proposed to construct a ready-mix plant containing an office, a garage to house trucks and other equipment and provide maintenance space, and concrete bins for the storage of sand and gravel. At any one time while the business was operating Mr. Kelderman estimated that there would be from 6 to 10 trucks as well as a loader on the property. Mr. Kelderman said that the gravel needed for his business is trucked from Folly Lake four times a week. Three truckloads a week of Portland cement are also brought in.

Mr. Kelderman explained that his reasons for preferring the subject site to a location in the Town's Industrial Park involved the traffic routing for his trucks and the increased distance and increased cost which would result from locating in the Industrial Park.

Mr. Kelderman stated that 85% of his truck traffic would need to go direct to the Rotary. Locating in the Industrial Park he said, would result in an increased distance travelled by each truck of approximately 1 mile because the Park's location would involve routing via the Haliburton Road and the Lyons Brook Road (Route 376) to reach the Pictou Rotary, whereas the subject site is only 1000 feet from the Rotary. More important than the distance factor Mr. Kelderman said were the steep grades involved in the Haliburton Road - Lyons Brook Road route. His estimate of the increased operating costs of locating in the Industrial Park as opposed to the subject site was an additional $4000 - 5000 per year because of both distance and grade. Currently, Mr. Kelderman said, his trucks use a back road or travel through the Town to reach the Rotary from his present Bayview location.

Various members of Town staff and Town Council gave evidence. Mr. Donald Wright, Municipal Constable and By-law Officer for the Town of Pictou stated that the operation of the open Town dump together with an incinerator which had been located on the south side of the Haliburton Road approximately 1000 feet from the junction with Route 376 was terminated October 31, 1981.

Mr. David Steele, Town Clerk, stated that the subject property was currently assessed for $10,000 and in his opinion might increase to approximately $40,000 with the buildings proposed by Mr. Kelderman. At the Town's 1983 commercial tax rate, Mr. Steele estimated that the taxes on the subject property could amount to approximately $1,600 if the property were developed as proposed by Mr. Kelderman.

Mayor Jordan, Mayor of the Town for 4 years, who was not present at the PAC hearing but was present at Town Council's public hearing and cast the deciding vote outlined his reasons for approval of the rezoning of the subject property. He stated that there was very little difference in the distance between the Appellant's property and either the subject property or the Industrial Park in his opinion. He said that if the previous use of the subject property (which was non-conforming) had not lapsed that there would have been no need for a rezoning. Since Mayor Jordan was aware that the subject property has been previously used for industrial purposes by Imperial Oil, and since he accepted Mr. Kelderman's opinion that the Industrial Park was not a suitable location for Kelderman Concrete, the Mayor felt that Council was justified in rezoning the subject property to allow the ready-mix business to locate there. Mayor Jordan said that the recommendation against the rezoning by the District Planning Commission was not a minor consideration in his decision but he felt that in this situation Council was justified in using the "loop hole" in MPS Policy C-3 which authorizes Council to allow uses outside the Industrial Park if "suitable land" was not available there.

Councillor Ann Wren who has represented Ward 2 on Pictou Town Council since November 1982 stated her reasons for voting in favour of the rezoning of the subject property. Councillor Wren felt that the location of a ready-mix plant on the subject property would cause no more traffic than the previous use of the site by Imperial Oil and she did not believe that the value of the Appellant's property would be affected by such a use. According to Councillor Wren the Lyons Brook Road (Route 376) is already heavily travelled by traffic to and from the ferries at Caribou but in her opinion was constructed to carry such heavy traffic and is wide enough to cope easily with trucks turning in or out of the subject property - unlike the Haliburton Road which is narrower and steeper and maintained by the Town. Because of the facilities on the Haliburton Road to the east of the Industrial Park and the heavy pedestrian traffic, Councillor Wren felt additional heavy trucks from a ready-mix concrete business would be unsafe. In summary, Councillor Wren stated that she believed Council's decision conformed to Policy C-3(a) in the MPS ("that the proposed use is site oriented") because she believed that Mr. Kelderman's business depends upon hauling and so needs easy highway access. Councillor Wren was less sure that Council's decision conformed to Policy C-3(b) because she felt that it was not "suitable land" that was unavailable in the Industrial Park but rather suitable access.

Mr. Lawrence LeBlanc, a member of the Town Council for 2 years explained his reasons for supporting the Council's decision to rezone the subject property. Councillor LeBlanc was present at all public hearings and meetings on this issue and voted in favour of the rezoning. Councillor LeBlanc's principle concern was that an Industrial Park location for Kelderman Concrete might result in increased heavy truck traffic through residential areas to avoid the steep hills of the Haliburton Road/Lyons Brook Road route. Councillor LeBlanc felt that Council's decision was in keeping with the MPS since the use of the subject property had been industrial for several years when the oil storage tanks owned by Imperial Oil were located on the site and had they not been removed would have continued to be industrial. The Councillor expressed the opinion that industry was very important for the Town's tax base.

Councillor Wayne MacGillvary who has represented Ward 1 on Town Council since 1979 (the subject property is in Ward 1) stated that he attended both PAC and Council meetings and had voted against the rezoning. He said that he accepted the recommendation of the District Planning Commission and the reasons given by the planners for recommending rejection of the rezoning application, and in addition he felt that Council should have taken into account the wishes of the area residents who were opposed to the rezoning.

Evidence was given by three people not called as witnesses by either party: John Pink of New Glasgow, and Stan McNeill and Jessie Johnson of the Town of Pictou. All opposed Council's decision to rezone the subject property.

John Pink has been for 13 years a real estate supervisor with the Sobey Group responsible for the management and care of the Company's properties in Pictou County. Foord Construction, a company of the Sobey Group, owns 36 acres in the area bounded by the West River Road, the Lyons Brook Road, the Haliburton Road and Highway 106. The Foord Construction property is adjacent to both the Appellant's property and the property which is the subject of this appeal. The property belonging to the Appellant, Mrs. Calvi, was sold by Foord to the previous owners. The oil tank farm was in operation on the subject property when the [now] Calvi property was sold by Foord Construction. Mr. Pink said that when the oil storage use was discontinued he saw that as an advantage. He felt that the area of the subject property was a highly visible one which could be attractive for residential uses and that a return to industrial use would create visual and noise pollution. For Mr. Pink, the previous industrial use of the subject property was no rationale for a return to industrial use, and he felt that Council's spot rezoning in this case was a "blight" on the subject property.

Both Mr. McNeill and Mrs. Johnson live on Dunromin Terrace, a short residential street running off Haliburton Road to the east of Highway 106. Mr. McNeill considered that the area between the Pictou Rotary along the Lyons Brook Road to the Town gut bridge at the junction of the Haliburton Road was potential prime residential land which would not be developed as such if industrial zoning in that area was allowed. Now that the dump previously operated on the Haliburton Road had been cleaned up and the Imperial Oil use of the subject property had been discontinued and the Rotary beautified, Mr. McNeill felt a return to an industrial use would be a shame. Mr. McNeill was concerned about the precedent that this rezoning created and the implications of Council's decision which he felt was that the Town's Industrial Park was unsuitable for light industry.

Mrs. Johnson who has lived for 20 years on Dunromin Terrace was primarily concerned that Council's decision was a spot rezoning which could lead to further rezonings in the immediate area for industrial or commercial uses. Like Mr. McNeill, Mrs. Johnson felt strongly that the Pictou Rotary was an important entrance point in Nova Scotia and should be kept as visibly attractive as possible. Both Mr. McNeill and Mrs. Johnson were reasonably confident about the quality of operation that Mr. Kelderman would run but were anxious about the impact of other subsequent industrial uses on the subject property.

Section 63(5) of the Planning Act clearly states that "The Board shall not allow the appeal unless the Board determines that the decision of the Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy." In this appeal, the Board accepts the argument of the Appellant and the evidence of the Planner, Mr. Merrithew, that Council's decision did not reasonably carry out the intent of the town's municipal planning strategy.

The two policies of the Municipal Planning Strategy most relevant to this appeal are Policies C-2 and C-3 which state:

> "C-2 It shall be the intention of Council to promote the new Industrial Park located adjacent to the Old Haliburton Road. This Industrial Park will become the major focus of new or additional industrial development within the Town."

> "C-3 Notwithstanding Policy C2, it shall be the intention of Council to allow industrial uses to locate outside the two designated areas under the following conditions:
>
> (a) that the proposed use is site oriented and must utilize the proposed site - e.g., boat building facility, or;
>
> (b) that suitable land was not available in the Industrial Park, adjacent to the Old Haliburton Road."

In the opinion of the Board, Council's decision neither promotes the Industrial Park nor assists it to "become the major focus of new or additional industrial development within the Town." Instead, the spot re-zoning and by-law amendments which would allow the proposed ready-mix concrete plant to locate on the subject property disperses new industrial development within the town.

Policy C-3 however, allows the location of industrial uses outside the Industrial Park "under the following conditions": "that the proposed use is site oriented and must utilize the proposed site," or "that suitable land was not available in the Industrial Park."

Counsel for the Town in her post-hearing brief states that "if the proposed use by Mr. Kelderman of the property in question can be said to fall within either of the categories of Policy C-3, then the Town did carry out the intent of the Municipal Planning Strategy.........".

Counsel for the Town argues with reference to Policy C-3(a) that the term "site-oriented" should not be given too narrow an interpretation. In her opinion,

> " In the same manner that a boat building facility must be located near the water so that the boats may be launched in the water upon completion, a business that involves the transportation of materials by truck and which receives supplies by truck, as does Mr. Kelderman's business, must be located near the highway so that the trucks will have access to the highway for the purpose of deliveries and for receiving supplies."

The Board disagrees with the argument that a business involving the transportation of materials by truck and the receiving of supplies by truck is a site oriented use which must be located near the highway. Any manufacturing or warehouse operation by analogy would quality as a site-oriented use under this definition, in fact it would be difficult to find industrial uses which did not meet that criteria. If the "condition" that a proposed use must be site oriented as stated in Policy C-3(a) is interpreted as widely as the Counsel for the Town recommends, it negates, in the Board's opinion, the clearly stated intention expressed in Policy C-2 that Council shall "promote the new Industrial Park."

On the alternative condition stated in Policy C-3(b) - that industry can locate elsewhere if suitable land is not available in the Industrial Park - Counsel for the Town argued that the question of suitability of the land available in the Industrial Park must be at the discretion of Council since the Town's MPS does not define the term or indicate how Council is to determine whether or not land is "suitable."

Counsel for the Town refers to Policy 0-7 of the Municipal Development Plan (MPS) which sets out the "Criteria for Amendment to the Zoning By-Law" and uses the term "suitability" in Sub-section (d) as follows:

> "(d) Suitability of the proposed site in terms of steepness of grades, soil and geological conditions, location of watercourses, marshes, swamps, or bogs;"

Counsel for the Town in her brief draws the following conclusion from Policy 0-7(d):

> " If the steepness of grades is set out in the Municipal Development Plan as one of the criteria for determining the suitability of a site with respect to a Zoning Amendment, it is submitted on behalf of the Town of Pictou that by inference, the steepness of grades is one of the criteria that the authors of the Municipal Development Plan intended the Town of Pictou to consider in determining the suitability of land in the Industrial Park."

The Board cannot agree that this reference to suitability of grade on a site proposed for the rezoning can by analogy be extended to become a criteria for evaluating the suitability of land within the Industrial Park. Furthermore, the steepness of grade referred to in Policy 0-7(d) is a condition of a site proposed for rezoning. The steepness of grade proposed as a criteria for suitability of land available within the Industrial Park is not at issue. What Town Council considered, as stated by the Mayor and Councillors who gave evidence in favour of the rezoning, was the steepness of grade of the roads in the vicinity of the Industrial Park, not of the available land in the Industrial Park.

Several witnesses who gave evidence in favour of Council's decision to rezone the subject property stated that its previous industrial use was a factor in their support of the decision to rezone to Light Industry (M-1) Zone. The use of the property for oil storage was non-conforming for approximately 18 years. The current Land-use By-law approved by the Minister on March 31, 1982, reconfirmed Council's intent that the subject property and surrounding area should remain residential and agricultural by continuing the non-conforming status of the subject property.

Council's decision to rezone the subject property appears to have been at variance with the wishes of area residents and the Councillor representing the area,with the recommendations of the District Planning Commission and the Planning Advisory Committee,and with its own intentions to preserve the subject property and surrounding area for rural residential and agricultural uses expressed just 2 years previously in its MPS.

The decision of Town Council to rezone the subject property and amend the Land-use By-law to allow the proposed industrial use is, in the opinion of the Board, a spot rezoning which does not reasonably carry out the intent of the Municipal Planning Strategy. In coming to this conclusion the Board visited the site and surrounding area, and reviewed the evidence and the briefs submitted by both parties.

Section 63(4) of the Planning Act states that:

> "The Board may
>
> (a) confirm the decision of the council;
>
> (b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or
>
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board."

For the foregoing reasons and pursuant to Section 63(4) of the Planning Act, the Board allows the appeal and reverses the decision of the Council of the Town of Pictou.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 31st day of August, A.D., 1984.

E A Lawrence

ELIZABETH LAWRENCE
Vice-Chairman

Fidelity Financial Corp. Ltd. v. County of Halifax

PLANNING--ZONING--AMENDMENT--REFUSAL TO REZONE 11.7 ACRES FROM P-2 TO R-1--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--PLANNING ACT, Ss. 63(1),(3),(4),(5)--COLE HARBOUR/WESTPHAL MPS, Policies P-73, P-91, P-93

This is an appeal from a decision of the Council of the Municipality of the County of Halifax refusing to amend the Municipality's Land-Use By-law for the Cole Harbour/Westphal area to rezone 11.7 ac. at Lawlor's Point, Cole Harbour from Community Facility (P-2) to Single Unit Dwelling (R-1). The subject property is covered by a Municipal Planning Strategy (MPS) and is a portion of approximately 23 ac. owned by the Appellant on Lawlor's Point, all of which is zoned P-2. The Appellant agreed to convey the remainder of the lands to the Municipality once the rezoning of the 11.7 ac. has been approved. The subject lands abut a 500' section south of Route 207 already zoned R-1, and the lands agreed to be conveyed lie adjacent to the waters of Cole Harbour. The Appellant already owns an abutting area of undeveloped land zoned R-1, which when combined with the subject lands would allow approximately 20 single family residential lots. Policy P-73 of the MPS reads: "It shall be the intention of Council ... to zone Lawlor's Point to a community facility zone." The subject lands are given a special area designation on the Generalized Future Land-Use Map and abut lands given a Residential A designation. The Planning Staff report recommended that Council approve the rezoning.

HELD--The appeal is dismissed. The decision of Council is confirmed.

The sole issue in this appeal is whether the decision of Council refusing to rezone the subject lands reasonably carries out the intent of the MPS. Policy P-91 of the MPS allows Council to consider an amendment to its Land-Use By-law to allow R-1 uses on the subject site provided the intent of all other Policies of the MPS are satisfied. In considering an amendment under Policy P-91, Council must have regard to the criteria set out in Policy P-93. The only matter set out there needing consideration here is whether "the proposal is in conformity with the intent of this Plan". The Appellant's proposal may comply with planning principles and it may be consistent with or necessary for the protection of the best interests of the municipality, however, the issue in this appeal is whether the decision reasonably carries out the intent of the MPS. Policy P-73 expressly states that the intention of Council is to zone Lawlor's Point Community Facility. If the Appellant's application was approved, the decision would contravene Policy P-73. An appropriate amendment to the MPS would be required before the Land-Use By-law with respect to Lawlor's Point could be amended. The Appellant has not discharged the onus on it.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, S.N.S. 1983;

- and -

IN THE MATTER OF: An appeal by Fidelity Financial Corporation Limited from a decision of Council of the Municipality of the County of Halifax refusing to rezone land at Lawlor's Point, Cole Harbour, Halifax County from Community Facility (P-2) Zone to Single Unit Dwelling (R-1) Zone.

BEFORE: D.W. WILSON, C.A., LL.B., Member

COUNSEL: STEWART MCINNES, Q.C., on behalf of the Appellant;

ROBERT CRAGG, LL.B., on behalf of the Municipality of the County of Halifax

DECISION

This is an appeal by Fidelity Financial Corporation Ltd. from a decision of the Council of the Municipality of the County of Halifax made February 21, 1984 refusing to amend the Municipality's Land-use By-law for the Cole Harbour/Westphal area with respect to 11.7 acres of land owned by the Appellant situate at the eastern end of Pacific Avenue, Lawlor's Point, Cole Harbour, Halifax County from Community Facility (P-2) Zone to Single Unit Dwelling (R-1) Zone.

The Notice of Appeal is dated March 7, 1984 and it was received by the Board on March 8, 1984. The Notice of Appeal set forth the grounds of appeal as follows:

"1. The decision did not reflect the recommendation of the County of Halifax Planning staff.

2. No public hearing was called to properly assess the application.

3. The lands in question, given the surrounding area, are appropriate for single unit zoning.

4. The applicant is prejudiced by the present zoning in that while paying taxes on same, there is no provision for reasonable use by the applicant.

5. The community as a whole would be better served by the requested re-zoning.

6. Council's decision did not appropriately consider the general merits of the application."

The appeal was heard by the Board on Tuesday, June 5, 1984 in the hearing room of the Expropriation Compensation Board, 1660 Hollis St., Suite 904, Halifax, Nova Scotia. The Appellant filed as Exhibit F-2 an affidavit of service of the Notice of Hearing on those persons the Board directed to be served with a copy of the Notice of Hearing. Counsel agreed that the matter was properly before the Board and the Board assumed jurisdiction to hear the appeal on its merits.

The appeal is brought under the provisions of Sub-section(1) of Section 63 of the Planning Act, whereby:

> "63(1) The amendment, revision or refusal by a council to amend or revise the land-use by-law may be appealed by
>
> (a) an aggrieved person;
>
> (b) the applicant;
>
> (c) the Director;
>
> (d) the council of an adjoining municipality. (emphasis added by the Board).

A copy of the Municipal Planning Strategy and the accompanying Land-use By-law for the Cole Harbour/Westphal area were filed with the Board as Exhibits F-4 and F-5 respectively.

The subject lands, consisting of 11.7 acres, are shown outlined in blue on a plan identified as "Proposed Subdivision Plan, Lawlor's Point, Cole Harbour" dated June 9, 1983 prepared by John A. McElman and Assoc. Ltd. which was included as part of a package of documents filed by the Municipality as Exhibit F-3.

The subject lands are a portion of approximately 23 acres of land zoned Community Facility (P-2) owned by the Appellant and located south of Route 207 on Lawlor's Point, Cole Harbour. The Appellant in its application to amend the Land-use By-law with respect to 11.7 acres of the 23 acres agreed to convey the remainder to the Municipality once its application for rezoning was approved.

Lawlor's Point is an area of land stretching from Route 207, (the Cole Harbour Road) south to the waters of Cole Harbour. The first 500 ft. south of Route 207 where it passes Lawlor's Point is zoned R-1. The Appellant owns property abutting both sides of this 500 ft. R-1 zoning line. The 11.7 acres which the Appellant requested to have rezoned abuts the existing 500 ft. zoning line to the south. The approximately 11 acres of land that the Appellant proposes to convey to the Municipality is the remaining portion of the Appellant's P-2 zoned property which lies adjacent to the waters of Cole Harbour. At present there is an undeveloped area of land zoned R-1 owned by the Appellant which lies between the developed residential lands fronting on Route 207 and the 500 ft. R-1 zoning line which runs parallel to Route 207. The Appellant proposes to combine the 11.7 acres of P-2 zoned land with its abutting R-1 zoned land to develop approximately 20 single family residential lots.

At present, the 23 acres of P-2 zoned land is heavily treed with a mixture of hardwood and softwood trees. The slope of the land is moderate to severe close to the road and undulating close to the water. Development could take place on the land the Appellant proposes to convey to the Municipality but the slope is so steep in this area it would be impossible to put in a road and construct single family dwellings. Approximately 2 to 3 acres of the land the Appellant proposes to convey to the Municipality is swamp land but the remainder is suitable for recreational uses.

Lawlor's Point is referred to at Page 57 of the Municipal Planning Strategy in a Section entitled "Special Area Designation." It reads as follows:

> "Lawlor's Point is the only area with waterfrontage on Cole Harbour and within the Plan Area which is not included in the Regional Plan's regional park designation. With the support of area residents, the Municipality has maintained a restrictive park and institutional zoning on the major portion of Lawlor's Point since 1974. It is the intention of the Special Area Designation to respond to continuing public concern and to uphold established Municipal policy by zoning these lands with a comparable zoning under the new zoning by-law. It is reasonable, however, to provide for the development of uses which are appropriate to environmental protection and public use in the area. In this regard, the community facility zone will allow for the development of recreational uses which are suited to the waterfront area in question."

Policy P-73 of this Section reads as follows:

> "It shall be the intention of Council, in consideration of the Porter Plan Advisory Committee recommendations, continuing community concern and established municipal zoning, to zone Lawlor's Point to a community

facility zone."

Policy P-91 of the Municipal Planning Strategy provides for the consideration of amendments to the Land Use By-law and it reads as follows:

> "Providing that the intentions of all other policies are satisfied, Council may, for the purpose of providing for the development of similar uses on properties which abut one another, consider the following amendments to the zoning by-law, for lands which are located where any land use designations abut one another, as shown on the Generalized Future Land Use Map (Map 1):
>
> (i) amendments within a designation to provide for the development of uses which are uses permitted within the abutting designation; or
>
> (ii) amendments within a designation to provide for the development of uses which are uses permitted by the zone on the abutting property within the abutting designation."

Policy P-93 sets forth criteria for the evaluation of amendments to the Land Use By-law and it reads as follows:

> "In considering amendments to the zoning by-law or development agreements, in addition to all other criteria as set out in various policies of this Plan, Council shall have regard to the following matters:
>
> (i) that the proposal is in conformity with the intent of this Plan and with the Requirements of all other municipal by-laws and regulations;
>
> (ii) that the proposal is not premature or inappropriate by reason of:
>
> (a) the financial capability of the Municipality to absorb any costs relating to the development;
>
> (b) the adequacy of sewer and water services;
>
> (c) the adequacy or proximity of school, recreation and other community facilities;
>
> (d) the adequacy of road networks leading or adjacent to or within the development; and
>
> (e) the potential for damage to or destruction of designated historic buildings and sites.

(iii) that controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:

(a) type of use;

(b) height, bulk and lot coverage of any proposed building;

(c) traffic generation, access to and egress from the site, and parking;

(d) open storage;

(e) signs; and

(f) any other relevant matter of planning concern,

(iv) that the proposed site is suitable in terms of steepness of grades, soil and geological conditions, locations of watercourses, potable water supplies, marshes or bogs and susceptibility to flooding."

The subject lands which are given a special area designation on the Generalized Future Land-Use Map abut lands which are given a Residential A designation on the Generalized Future Land Use Map. The land abutting the subject lands are presently Zoned R-1. The subject lands are presently Zoned P-2.

The Land-use By-law for the Cole Harbour/Westphal area sets forth the following permitted uses in a P-2 zone:

" No development permit shall be issued in any P-2 (Community Facility) Zone except for the following:

Institutional Uses

Educational institutions and uses;
Denominational institutions and uses;
Day care facilities;
A single dwelling unit in conjunction with a day care facility;
Fire and police stations;
Government offices and public works;
Hospitals and medical clinics;
Public libraries, museums and galleries;
Community centres and halls;
Recreation uses.

> Open Space Uses
>
> Public and Private parks and playgrounds;
> cemeteries;
> Historic sites and monuments."

The Land-use By-law sets forth the following permitted uses in a R-1 Zone:

> "No development permit shall be issued in any R-1 (Single Unit Dwelling) Zone except for the following:
>
> Residential Uses
>
> Single unit dwellings;
> Professional offices in conjunction with permitted dwellings;
> Day care facilities for not more than fourteen (14) children and in conjunction with permitted dwellings.
>
> Community Uses
>
> Open space uses."

Evidence for the Appellant was given by J. Michael Hanusiak and George Russell. The Municipality did not call any witnesses. Mr. Ira Settle, and Mr. Rick Stewart made submissions to the Board.

Mr. Hanusiak is employed as a planner with the Planning Department of the Municipality of the County of Halifax. His prime areas of responsibility include administering the Land-use By-law, obtaining comments on the applications from other Municipal agencies and preparing a planning report for presentation to the Municipal Planning Advisory Committee for recommendation to County Council.

The Planning report of January 16, 1984, a copy of which was introduced as part of Exhibit F-3 recommended that Halifax County Council approve the application for amendment to the Land-use By-law. The planning report refers to a previous rezoning attempt. The report states:

"Previous Rezoning Attempt

In 1979, an unsuccessful attempt was made to rezone the entire 23 acres of the subject property from P (Park and Institutional) Zone to the R-1 Zone. A staff report cited the following reasons for rejecting the application:

- Park and Institutional zoning was applied by the Municipality in 1973 and upheld by the predecessor to the Nova Scotia Municipal Board - the Provincial Planning Appeal Board.
- the impact of large scale development on the nearby aquatic environment.
- the 25-30 years needed to complete the project due to the County's subdivision regulations which permitted only one lot to be approved per calendar year because it fell within the "subdivision planned area".
- the rezoning would be premature in light of anticipated amendments to the Halifax-Dartmouth Regional Development Plan which would place Lawlor's Point under this Regional Park land use designation."

The report contains the following recommendations:

"The Department of Planning and Development recommends that the proposed rezoning be approved for the following reasons:

1. Many of the reasons for rejecting the zone change request in 1979 are not now applicable to the subject application. For example:
    - Past concerns focused on the environmental effects stemming from the development of all 23 acres of the Hayman property. With the scope of the application reduced to under 12 acres, the area to be rezoned is far enough from the water's edge to prevent any harmful impacts to the aquatic environment.
    - The anticipated inclusion of Lawlor's Point under the Regional Plan's Regional Park Designation has not taken place. Furthermore, the Department of Municipal Affairs has stated that the Province is no longer interested in acquiring the Hayman property for its regional park purposes.
    - While the County's subdivision regulations still

permit only one lot to be approved per calendar year, proposed amendments will result in this restriction being removed. Thus, the development of all lots may take place at one time, rather than the 20-25 year period as determined by the existing regulation.

2. Of particular concern to residents in the area is the possibility that any development on Lawlor's Point might adversely affect the view of Cole Harbour from Long Hill. However, site investigations have determined that the area to be rezoned cannot be seen from the Cole Harbour Road at Long Hill, thus the viewplane from this vantage point will remain unspoiled.

3. The acquisition of the remaining 11 acres provides the Municipality with the most effective means of controlling development on the environmentally sensitive portion of the Hayman property. Given the Municipality's concern over maintaining the environmental integrity of the Lawlor's Point/Cole Harbour area, the applicant's proposal is seen as equitable compromise.

RECOMMENDATION

THAT THE PROPOSED REZONING OF A PORTION OF THE LANDS OF RONALD HAYMAN, LOCATED AT LAWLOR'S POINT, COLE HARBOUR, FROM P-2 (COMMUNITY FACILITY) ZONE TO R-1 (SINGLE UNIT DWELLING) ZONE, BE APPROVED BY COUNTY COUNCIL."

Mr. Hanusiak stated that the proposed residential development would not obstruct the view of Cole Harbour for the motoring public or the view from Long Hill as the tops of the homes would not be above the tree line.

Mr. Hanusiak also stated that the government of the Province of Nova Scotia was no longer interested in Lawlor's Point as part of a regional park. Mr. Hanusiak referred to a letter dated November 9, 1983 he received from Mr. Jack Leedham, a Coordinator with the Community Planning Division of the Department of Municipal Affairs which was included as part of the package of documents filed by the Municipality as Exhibit F-3. This letter reads as follows:

> "I don't think there is any question that in the past the province along with community groups, residents and the municipality has expressed an interest in the future recreational use of lands in and around Lawlor's Point.
>
> The Province has recently amended the Cole Harbour/Lawrencetown Regional Park designation. This amendment reflects the work of the province and these communities with respect to the designation, acquisition, development and maintenance of this regional park. Unfortunately Lawlor Point is not part of this regional park designation.
>
> Further to this, I have within the past 12 months attempted to have these lands acquired by the Department of Lands and Forests from Fidelity Financial Corporation Ltd. as part of this regional park designation. The negotiations were unsuccessful and because of this and our present policy with respect to this regional park, I think it is fair to state that the province has no interest at the present time in the acquisition of these lands for regional park purposes."

Mr. Hanusiak also stated that the departments of Health and Environment of the Province of Nova Scotia did not express any concern with a residential use for the subject lands although they indicated they would be interested in the way the residential use would be developed.

In Mr. Hanusiak's opinion, the proposed rezoning by the Appellant has several merits. The presently undeveloped land would be developed with approximately twenty single family residential lots with a range in area from 20,000 to 40,000 square feet. The development would not affect the scenic beauty of Lawlor's Point. The acquatic life of Cole Harbour and the land water's edge of Cole Harbour/Lawlor's Point, which is approximately 1,000 feet from the proposed residential site would not be affected by the development. The Municipality, as a result of a dedication of land by the Appellant, would obtain ownership of the most sensitive area of Lawlor's Point. The P-2 uses which are currently permitted as-of-right on the entire twenty-three acres of the Appellant's property and if developed would have a greater negative impact on the environment of Lawlor's Point than the proposed R-1 uses would be eliminated.

Mr. Hanusiak said he was not sure of the intent expressed on Page 57 of the Municipal Planning Strategy, which is quoted at Page 4 of this decision. Mr. Hanusiak said that if the intent of the Municipal Planning Strategy is to secure Lawlor's Point in its undeveloped state, the land should be zoned Open Space (P-1) and not Community Facility (P-2). If the intent of the Municipal Planning Strategy is to allow for certain types of development, in his opinion, the likelihood of harm to the environment of Lawlor's Point is much less if one-half of the twenty-three acres is developed with R-1 uses and the balance dedicated to the Municipality than if all twenty-three acres is developed with P-2 uses. In Mr. Hanusiak's opinion, there is no expression of intent in the Municipal Planning Strategy that land should be left forever in its natural state. In Mr. Hanusiak's opinion, having considered the concerns of the residents in the area and the wording of the Municipal Planning Strategy, the Appellant's application to rezone 11.7 acres of approximately 23 acres of land on Lawlor's Point and dedicate the balance to the Municipality is the best compromise possible to develop the subject lands and yet preserve the beauty and environment of Lawlor's Point.

Mr. George Russell, a licensed architect and qualified land-use planner, is the President of Project Architects Limited. He was called as a planning expert to give evidence on behalf of the Appellant. Mr. Russell was retained the day before the hearing of the appeal and he visited the subject site for the first time on the morning of the hearing.

Mr. Russell stated that Lawlor's Point is recognized for its scenic beauty and the environment in this area must be protected. According to Mr. Russell, the significant dedication of land by the Appellant to the Municipality would ensure that the environment of Lawlor's Point is protected at its most sensitive area which is the land/water's edge. Mr. Russell also stated that the proposed large building lot sizes suggest a low density single family development which would have little impact on the environment of Lawlor's Point. In Mr. Russell's opinion, the R-1 zoning and the dedication of land would be better than the P-2 zoning for the purpose of carrying out the items expressed on Page 57 of the Municipal Planning Strategy. Mr. Russell said that he was not aware of any part of the Municipal Planning Strategy that was contravened by the rezoning application.

Mr. Ira Settle is a former Warden of the County of Halifax and a former Councillor for the Cole Harbour/Westphal Area which includes Lawlor's Point. Mr. Settle gave evidence on behalf of the Cole Harbour Rural Heritage Society. He stated that the concern of the residents in the Lawlor's Point area is the protection of the waters of Cole Harbour. Mr. Settle reviewed the events which led to this concern. In the early 1960s, a gravel washing plant was located on the Little Salmon River, which flows directly into Cole Harbour. According to Mr. Settle, Little Salmon River, which was one of the best salmon rivers in the area, was polluted by the waste from the gravel washing plant. Mr. Settle stated that there was so much silt deposited at the mouth of Cole Harbour that it was difficult for boats to get up to Lawlor's Point. The residents along the Cole Harbour Road watched as part of Cole Harbour was being destroyed by pollution and they did not want to see the rest of Cole Harbour polluted. In 1973 they applied to the Municipality of the County of Halifax for some form of protective zoning for the land touching Cole Harbour including Lawlor's Point. The first 500 feet south of the Cole Harbour Road on Lawlor's Point was zoned R-1 with the lands located between the 500 foot zoning line and the waters of Cole Harbour zoned Park and Institutional. When the Municipal Planning Strategy and accompanying Land-use By-law was adopted for Cole Harbour/Westphal in 1982, the Park and Institutional zoning was changed to Community Facility (P-2).

In Mr. Settle's opinion, to change the zoning of the land located south of the 500 foot R-1 zoning line would be a "hurt to the people" who on their own tried to get some environmental protection through zoning for Lawlor's Point while waiting for the Provincial Government to include this area as part of a regional park. In Mr. Settle's opinion, the present P-2 zoning adequately reflects the wishes of the people and it ensures that if development occurs it will be for public use and public protection.

Mr. Rick Stewart resides at 83 Avondale Road, Cole Harbour. From 1974 to 1979, he was Chairman of the Cole Harbour Area Planning Committee which was established because of the concern of citizens with the protection of the environment around Cole Harbour. As Chairman of the Cole Harbour Area Planning Committee he was a member of the Porter Plan Advisory Committee which was established to provide input into the development and management of the

Cole Harbour Lawrencetown Regional Park Site. He also was a member of the Public Participation Committee established to provide public input and participation in the preparation of the Cole Harbour/Westphal Municipal Planning Strategy. From 1979 to 1982 he represented Cole Harbour/Westphal as a Councillor on Halifax County Council. Mr. Stewart was not a member of Halifax County Council when the Cole Harbour/Westphal Municipal Planning Strategy was approved by the Minister of Municipal Affairs on November 26, 1982.

According to Mr. Stewart, the Public Participation Committee and the Porter Plan Advisory Committee wanted to protect Lawlor's Point. He said that the Public Participation Committee wanted the lands south of the 500 foot zoning line as part of a regional park. They also preferred an open space (P-1) zone for this area. Mr. Stewart stated that the present P-2 zoning on Lawlor's Point is questionable in terms of providing protection to the environment. In his opinion, the P-2 zone placed on Lawlor's Point was a compromise by Halifax County Council. The P-2 zone theoretically allowed the owners of land south of the 500 foot zoning line to develop their property as long as it was developed for public enjoyment. It also offered some protection for the environmentally sensitive area of Lawlor's Point. Mr. Stewart fears that if the 500 foot R-1 zoning line is adjusted for one land owner, it will set a precedent and it will be difficult to refuse rezoning applications from other land owners.

Counsel for the Appellant submits that there will not be any adverse impact on the environment of Lawlor's Point or any pollution to the waters of Cole Harbour as a result of the Appellant's rezoning. He further submits that the dedication of approximately 11 acres of land to the Municipality guarantees through municipal ownership public use of the Cole Harbour/Lawlor's Point waterfront area in a way the present zoning does not. He further submits that the present P-2 zoning poses a greater threat to the environment of Lawlor's Point than the Appellant's proposal. Counsel for the Appellant also submits that Mr. Hanusiak and Mr. Russell, the only witnesses qualified to give expert planning evidence, indicated that there was no objection to the Appellant's proposal from a planning point of view.

Counsel for the municipality submits that Council's intention is to provide for environmental protection and public uses on Lawlor's Point by zoning the area community facility (P-2). He further submits that there is no indication of intention in the Municipal Planning Strategy to zone any part of Lawlor's Point south of the 500 foot R-1 zoning area to a R-1 zone. He also submits greater weight should be given to the evidence of Mr. Settle and Mr. Stewart than to the evidence of Mr. Hanusiak and Mr. Russell because Mr. Settle and Mr. Stewart were involved in the preparation of the Planning Strategy for Cole Harbour/Westphal and as former Councillors, know the wishes of the people in the area with respect to Lawlor's Point.

Section 63(3) of the Planning Act reads as follows:

> "The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy."

In the opinion of the Board, the sole issue in this appeal is whether the decision of Council reasonably carries out the intent of the Municipal Planning Strategy.

Policy P-91, which was quoted at Page 5 of the decision, allows Council to consider an amendment to its Land-use By-law to allow for the development of R-1 uses on the subject site provided that the intent of all other Policies of the Municipal Planning Strategy are satisfied. In considering an amendment to the Municipal Planning Strategy under Policy P-91, Council must have regard to the criteria set out in Policy P-93 which was quoted at Page 5 of this decision. The Appellant's proposal meet the criteria set out in Sections (II) and (IV) of P-93. The criteria set out in Section (III) refers to a development agreement and is not applicable in this appeal. The Appellant's proposal also conforms with the Municipal By-laws and Regulations which are part of the criteria set out in Section (I) of P-93. The only matter set out in Section (I) of P-93 left for consideration is whether "the proposal is in conformity with the intent of this Plan."

The Board accepts the evidence of Mr. Hanusiak and Mr. Russell that the Appellant's proposal is a worthwhile proposal for Lawlor's Point which takes into account the sensitive nature of the environment of the area. The Board also agrees with the submission of Counsel for the Appellant that the Appellant's proposal of R-1 zoning and dedication of land to the municipality is preferable for Lawlor's Point to the present P-2 zoning in providing "for the development of uses which are appropriate to environmental protection and public use in this area." The Board also notes that one of the reasons mentioned in the staff report for recommending that the proposed rezoning be approved is that many of the reasons for rejecting the 1979 rezoning application with respect to the subject property are not applicable to the present rezoning application. In 1979 there was no Municipal Planning Strategy to guide Council when considering amendments to the zoning by-law and rezoning applications were considered on the basis of whether or not they were consistent with or necessary for the protection of the best interest of the municipality. The Appellant's proposal may comply with planning principles and it may be consistent with or necessary for the protection of the best interest of the municipality, however, the issue in this appeal is not whether the Appellant's proposal is in the best interest of the municipality but whether the decision of Council reasonably carried out the intent of the Municipal Planning Strategy.

While the preamble to Policy P-73 found at Page 57 of the Municipal Planning Strategy and quoted at Page 4 of this decision, suggests some flexibility in the intent of the Municipal Planning Strategy with respect to Lawlor's Point, Policy P-73 expressly states that the intention of Council is to zone Lawlor's Point Community Facility. The Board disagrees with the opinion of Mr. Hanusiak and Mr. Russell that the Appellant's application does not contravene any of the provisions of the Municipal Planning Strategy. In the opinion of the Board, if the Appellant's application was approved by Council, the decision of Council would contravene Policy P-73 of the Municipal Planning Strategy. In the opinion of the Board, Policy P-73 was obviously inserted in the Municipal Planning Strategy as an expression of the strong desire and intention on the part of Council to have Lawlor's Point zoned Community Facility.

In the opinion of the Board, Policy P-73 is clear in its intention that Council zone Lawlor's Point to a Community Facility zone. Council did in fact zone Lawlor's Point to a Community Facility zone and they have refused the Appellant's application to alter that zoning. In the opinion of the Board, an appropriate amendment to the Municipal Planning Strategy would be required before the Land-use By-law with respect to Lawlor's Point, could be amended.

Section 63 (4) and (5) of the Planning Act read as follows:

"63(4) The Board may

(a) confirm the decision of the council;

(b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or

(c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board."

"63(5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

In the opinion of the Board, the Appellant has not discharged the onus on it of establishing that the Council's decision under appeal does not reasonably carry out the intent of the Municipal Planning Strategy. The Board, having considered the evidence, having heard the argument of Council, having visited the site and having studied the Land-use By-law and the Municipal Planning Strategy is satisfied that Council's decision reasonably carries out the intent of the Municipal Planning Strategy and therefore confirms the decision of Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 21st day of September, A.D., 1984.

DARRYL W. WILSON

Charbonneau et al. v. County of Halifax

PLANNING--CONTRACT ZONING--REFUSAL TO ENTER INTO DEVELOPMENT AGREEMENT TO PERMIT SALVAGE YARD--WHETHER CONSISTENT WITH THE INTENT OF THE MPS--PLANNING ACT, Ss. 38(1),(2), 55(1),(2), 72(1),(2),(4)--COW BAY/EASTERN PASSAGE MPS, Policies P-18, P-49, P-88--COUNTY OF HALIFAX COW BAY/EASTERN PASSAGE LAND-USE BY-LAW, Sections I, II, III, Appendix "Ba"

This is an appeal from the refusal of the Council of the Municipality of the County of Halifax to enter into a develoment agreement with the Appellants respecting a salvage yard on Hines Road at Eastern Passage. The area in question was covered by the Municipal Planning Stategy for Cow Bay/ Eastern Passage (the MPS). The two parcels of land in question are zoned Light Industry (I-1), as is most of the surrounding land. Policy P-49 of the MPS authorizes Council to "consider a development agreement to permit the development of a salvage operation on the lands of Wilmer and Mary Charbonneau, Hines Road, as identified in Appendix "Ba" of the Zoning By-law". The Land-Use By-law for the area states in Appendix "Ba" that "notwithstanding anything else in this By-law" the subject properties "may be used for purposes of a scrap and salvage operation in accordance with the Municipal Development Plan for Eastern Passage/Cow Bay and Sections 33(2)(b) and 34 of the Planning Act."

HELD--The appeal is allowed. The Board refers the matter back to Council under the provisions of s. 72(4)(a) of the Planning Act.

The sole issue is whether the decision made by Council refusing to enter into a development agreement to permit the use of the subject lands for salvage yard purposes is consistent with the intent of the MPS for this area. Mr. C. has since at least 1979 been at odds with the Municipality over a proposed salvage yard at the subject site. It is safe to say that Council added late in the planning process specific references to the Appellants' properties in the MPS and Land-Use By-law to accommodate them in some manner. But in what manner? Policy P-49 by itself does not provide the Appellants with any right to have a salvage yard established. At the very least it contemplated Council could enter into an agreement if it was not inconsistent with the intent of the MPS; it also strongly suggests that a development agreement of some nature would be possible within the intent of the MPS. The provision in the Land-Use By-law gives Council the right to approve a salvage yard use for these properties despite the fact that the properties are zoned I-1 and this zone does not permit a salvage yard. What the Board is obliged to do in an appeal under s. 72 is to examine the proposed agreement in the light of the intent of the MPS. This intent must be gathered from a perusal of the entire MPS. Concern is expressed in Section II of the MPS regarding the airport at Canadian Forces Base Shearwater respecting, inter alia, birds being attracted to disposal and scrap areas affecting flight paths. The Board is satisfied the proposed development agreement adequately safeguards against this. Policy P-18 indicates Council's intention that Hines Road be a truck route. The Generalized Future Land Use Map shows the subject properties within a large area designated as "Industrial". The MPS states that this designation "reflects locations of heavy and service industry ... and provides for their expansion and for the development of complementary industrial and commercial operations". It appears to the Board that a salvage yard in an area already predominantly zoned I-1 is a compatible use providing the areas to be so used are buffered and set back a reasonable distance from Hines Road. The draft development agreement negotiated by the Municipality's staff in connection with a previous application by the Appellants is adequate for the purpose of establishing a salvage yard on the subject lands. The proposed use and the proposed development agreement are reasonably consistent with the intent of the MPS and Council's decision not to enter into an agreement cannot reasonably be said to be consistent with the intent of the MPS.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Statutes of Nova Scotia, 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by Wilmer Charbonneau, Mary Charbonneau and Mary Sloane from the decision of the Council of the Municipality of the County of Halifax made December 20, 1983, refusing to enter into a Development Agreement respecting lands on the Southeastern side of Hines Road at Eastern Passage for use as a Salvage Yard.

BEFORE: R.H. BLOIS, Q.C., Chairman

DARRYL W. WILSON, C.A., LL.B, Member.

COUNSEL: DAVID A. GRANT, LL.B,
For the Appellants,

ROBERT G. CRAGG, LL.B,
For the Municipality of the County of Halifax;

THOMAS P. DONOVAN, LL.B,
On behalf of Canadian National Railway (C.N.R.) and Autoport Limited.

DECISION

This is an appeal under Section 72, subsection (1) of the Planning Act, Statutes of Nova Scotia, 1983, Chapter 9, by Wilmer Charbonneau, Mary Charbonneau and Mary Sloane as Applicants from the refusal of the Council of the Municipality of the County of Halifax (hereinafter called the Municipality), made on December 20, 1983, to enter into a development agreement with the Appellants respecting a salvage yard use of certain lands on the southeastern side of Hines Road at Eastern Passage in the Municipality of the County of Halifax. The Notice of Appeal (Exhibit C-1) is dated January 9, 1984, and was filed with the Board on January 10, 1984. The following are the grounds of appeal set out in the Notice of Appeal:

> "1) That the Council having designated this land use in the Municipal Development Strategy should have, at law, negotiated the development contract;
>
> 2) The Council failed to give reasons for the decision pursuant to Section 72(2) of the Planning Act;
>
> 3) And Further that since the land use was designated in the Municipal Development Strategy and the zoning by-law attached, thereto, for use as a salvage yard, that this land use must therefore be consistent with the intent of the Municipal Planning Strategy as required by Section 72 of the Planning Act."

The hearing of the appeal took place on April 9, 1984, in the hearing room of the Expropriations Compensation Board, Halifax.

Section 72 of the Planning Act reads as follows:

> "(1) Where a council has refused to enter into an agreement after application has been made to it pursuant to Section 55 or 56, the applicant may appeal the refusal to the Board.
>
> (2) A decision of the council pursuant to subsection (1) shall provide the applicant with reasons for the decision."

The application to the Municipality was made pursuant to Section 55 of the Planning Act which reads as follows:

> "(1) Policies adopted by a council pursuant to clause (p) of subsection (2) of Section 38 to provide for development by agreement shall identify matters that the council shall consider prior to the approval of an agreement and the

developments that are subject to agreement.

(2) Where a municipal planning strategy contains policies pursuant to subsection (1), the land-use by-law shall identify the developments to be considered by agreement."

Section 38 of the Planning Act reads as follows:

"(1) A municipal planning strategy or an inter-municipal planning strategy shall include any policies necessary to carry out the intent of applicable provincial land-use policies.

(2) A municipal planning strategy or an inter-municipal planning strategy may include statements of policy with respect to any or all of the following:

a) the goals and objectives of the municipality for its future;

b) the improvement of the physical and social environment of the municipality;

c) the use, protection and development of lands within the municipality, including the identification, protection, use and development of lands subject to flooding, steep slopes, lands susceptible to subsidence or erosion, swamps, marshes and other environmentally sensitive areas;

d) subject to any other enactment, the protection of pits, quarries and aggregate deposits;

e) the use or change in use or intensity of use of activities in or affecting land, including but not restricted to residential, commercial, industrial, institutional and recreational uses;

f) requirements for environmental studies to be carried out prior to undertaking specified developments or development in specified areas;

g) requirements for the staging of development;

h) the provision of municipal services and facilities, including but not restricted to:

- i) public buildings,
- ii) parklands, playgrounds, public open spaces and other recreational facilities,
- iii) the collection, treatment and disposal of sewage and the disposal of refuse,
- iv) the provision of an adequate and efficient transportation network and related systems,
- v) the supply and distribution of water, including the management and protection of watershed areas, groundwater recharge areas, water treatment, transmission and distribution;

i) educational, cultural and health facilities;

j) storm-water management and erosion control;

k) the programing of municipal investment in respect of public and private development, and the co-ordination of public programs relating to the economic, social and physical development of the municipality;

l) the continuance or discontinuance of non-conforming uses in accordance with Section 87;

m) subdivision of land;

n) the use and conservation of energy, including the height or siting of developments;

o) measures for informing or securing the views of the public regarding contemplated planning policies and actions or regulations arising from such policies;

p) policies governing

- i) the use of development agreements in accordance with Section 55,

ii) the establishment of comprehensive development districts in accordance with Section 56,

iii) the use and application of conditions in accordance with Section 57;

q) policies governing any of the matters in Section 53 or 54;

r) any other matter relating to the physical social or economic environment of the municipality."

At the commencement of the hearing on April 9, 1984, counsel for the Municipality, the C.N.R. and Autoport Limited agreed that the appeal was properly before the Board and that the Board could hear the appeal on the merits.

Counsel for the Appellants advised the Board in his opening remarks that although the Notice of Appeal referred to one of the Appellants as Mary Sloane her name was in fact Margaret Sloane. He also stated that since this is a case of an appeal pursuant to Section 72 of the Planning Act from the refusal of the Council of the Municipality to enter into a Development Agreement the appeal to the Board is for the purpose of the Board determining whether or not the Council's decision is consistent with the Municipality's Municipal Planning Strategy (MPS) for the Cow Bay/Eastern Passage area where the subject land is situate. This area covers all of the Municipality's electoral District No. 6. He also pointed out that there were specific provisions in the MPS and Land-Use By-law to permit the application which the Council refused and therefore the Council's decision was inconsistent with the MPS for the subject area and the Board would be asked to remit the matter back to the Council for purposes of negotiating an agreement. Counsel for the Appellants also pointed out that the decision of the Council under appeal did not set forth the Council's reasons as provided for in s.s. (2) of Section 72 of the Planning Act. He also indicated that subsequent to the Council's decision he requested reasons for the Council's decision but did not receive reasons. He pointed out to the Board that there is a copy of an internal memorandum dated January 13, 1984, from Keith Birch, Chief of Planning and Development to G.J. Kelly, Municipal Clerk and Treasurer filed with the Board under Tab 15 of Exhibit C-3 in which Mr. Birch states in part:

> "Noted amongst the grounds of appeal, is that Council failed to give reasons for it's decision. Of course, Council's decision not to enter into the Agreement was based on its previous decision of May 2, 1983. From the minutes of that hearing, it can be ascertained that the reasons were as follows:
>
> a) Municipal Development Plan process asked that there be no more salvage yards in Eastern Passage/Cow Bay and had recommended against such for this property (pg. 29).
>
> b) Proposed use would be detrimental to future industrial use in the I-1 Zone (pg. 30).
>
> c) Question of jurisdiction was raised by opponents for Shearwater, Autoport, C.N.R. and Ratepayers (pg. 30)."

In the Board's opinion the sole issue in this appeal is whether the decision made by the Council refusing to enter into a development agreement to permit the use of certain lands on the Hines Road for salvage yard purposes is consistent with the intent of the Municipal Planning Strategy of the Municipality for the Eastern Passage/Cow Bay area.

Subsection (4) of Section 72 of the Planning Act reads as follows:

> "The Board shall not interfere with the decision of the council pursuant to this Section unless the Board determines that the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the municipal planning strategy, in which case the Board shall
>
> a) refer the matter back to the Council; and
>
> b) instruct the council to hold a public hearing in accordance with Section 42, if this had not been carried out prior to the appeal being made by the applicant".

At the time of the application for approval of the development agreement in question the Municipality had in effect a Municipal Development Plan, now known as a Municipal Planning Strategy (MPS) for the Eastern Passage/Cow Bay area which includes the subject properties on the Hines Road at Eastern Passage. A copy of the MPS (MDP) approved by the Minister of Municipal Affairs on September 8, 1982, was filed with the Board as Exhibit C-4.

The application to the Municipality was made by the three appellants requesting that the Municipality enter into a development agreement with them to permit the operation of a salvage yard on two parcels of land, namely Lot A3X of the Charles Clarke Subdivision and Block WC1 of the Mary Charbonneau and Margaret Louise Sloane Subdivision, Hines Road, Eastern Passage.

In 1980 the Appellants had applied to the Municipality to have the subject properties rezoned from Residential Two Family Dwelling (R-2) Zone respecting Lot A3X and from Commercial Local Business (C-1) Zone respecting Block WC1 to Salvage Yard and Dump (SD) Zone and this application had been refused by the Municipality and was appealed to the Provincial Planning Appeal Board and subsequently withdrawn.

In August of 1982, the Appellants applied to the Municipality for approval of a Development Agreement to permit the operation of a salvage yard and in May of 1983, after a public hearing was held, the Municipality refused to enter into a Development Agreement with the Appellants and this decision was appealed to the Municipal Board although at that time the Planning Act did not provide for an appeal from the "refusal" of a council to enter into a development agreement. The appeal was later withdrawn due to the fact that a new Planning Act, Statutes of Nova Scotia, 1983, c. 9, came into force on June 1, 1983 which expressly provided for an appeal to this Board from a Council's decision refusing to enter into a Development Agreement.

The Appellants then made a new application under Section 55 of the Planning Act, 1983, c. 9, received by the Municipality on October 11, 1983, for the approval of a Development Agreement to permit the operation of a salvage yard. The Municipal Council refused to enter into a Development Agreement with the Appellants and the Appellants filed a Notice of Appeal resulting in the hearing held before this Board on April 9, 1984.

Evidence was given by Valerie Spencer, a planner employed by the Municipality of the County of Halifax, Dorothy Cartledge also a planner employed by the Municipality, G. Barry

MacLellan, an inspector employed by the Board of Commissioners of Public Utilities and Wilmer Charbonneau, one of the Appellants.

Valerie Spencer who holds a degree in Urban and Regional Planning from the University of Waterloo and who has been employed as a planner by the Municipality for approximately five years was the first witness to be called by the Appellants. She worked with the public participation committee for the Cow Bay and Eastern Passage areas during the time that the MPS (MDP) for these areas was in preparation.

Ms. Spencer indicated that she was familiar with the Charbonneau and Sloane lands and was involved in the preparation of the MPS. She indicated that the MPS specifically refers to lands of Wilmer and Mary Charbonneau in Section P-49 at page 48 of the MPS under the general heading of "Commercial Designation". Furthermore, she stated that these same lands were specifically referred to in the Land-Use By-law for the area (Appendix "B3" of Exhibit C-5).

Section P-49 of the Land-Use By-law reads as follows:

> "It shall be the intention of Council to provide for the continuation of legally existing scrap or salvage operations identified in Appendix "B" of the Zoning By-law. Council may consider the expansion of such operations according to the provisions of Sections 33(2)(b) and 34 of the Planning Act with regard to the provisions of Policy P-88 and the following:
>
> i) that there is adequate lot area to provide for all yards to be a minimum of twenty-five (25) feet in width or depth, as the case may be;
>
> ii) that the visual buffering or screening of the total operation may be considered under the terms of any development agreement.

> In addition, Council may consider a development agreement to permit the development of a salvage operation on the lands of Wilmer and Mary Charbonneau, Hines Road, as identified in Appendix "Ba" of the Zoning By-law".

She was the planner assigned to write the Land-Use By-law on behalf of the public participation committee and the Council.

Appendix "Ba" at page 72 of the Land-Use By-law under the heading "Salvage Operation" reads as follows:

> "Notwithstanding anything else in this By-law, the following lands may be used for the purposes of a scrap and salvage operation in accordance with the Municipal Development Plan for Eastern Passage/Cow Bay and Sections 33(2)(b) and 34 of the Planning Act.

Lands of Wilmer Charbonneau	Hines Road	371948 40103855 40103863
Lands of Mary Charbonneau	Hines Road	371930"

Immediately preceeding Appendix "Ba" in the Land-Use By-law is Appendix "B" which lists a number of existing uses "deemed to be permitted uses to the extent to which they are in existence on the effective date of this By-law..." Included in the list under Appendix "B" are five properties identified by the names of the owners and the L.R.I.S. property numbers of the lands. These five properties are listed under the heading "Scrap and Salvage Operations".

Ms. Spencer stated that prior to the Council adopting the MPS (MDP) and Land-Use By-law (Zoning By-law) for Cow Bay/Eastern Passage area a public hearing was held to give members of the public an opportunity to comment on the proposed documents. One submission at this time was made by Mr.

Charbonneau who requested the Council to extend some consideration to his proposed salvage yard and the Council responded by specifically referring to the Charbonneau property in the MPS.

On questioning of Ms. Spencer by Counsel for the Municipality it appears that the public participation committee had not recommended that the Charbonneau lands be expressly mentioned in the MDP (MPS). Ms. Spencer indicated that the Charbonneau application involved two parcels of land on the Hines Road and that these parcels were not contiguous.

The Board notes that there is a sketch map shown in Tab 2, page 41, of Exhibit C-3 which shows four separate parcels of land on the south side of Hines Road owned by Charbonneau or Sloane. This map indicates that Lot A3X is the most westerly parcel of land and is "L" shaped, the "L" portion being behind Lot A4 which abuts lot A3X on the east. Lot A3X contains a building on the front portion which was at one time used by Mr. Charbonneau as a rabbitry. Lot A4 contains a residential building in which the Charbonneaus' reside. Lot A4 bears the Civic No. 323 Hines Road. East of Lot A4 are three large vacant parcels of land owned by the C.N.R. East of these three parcels is the parcel known as Block WC1 which has a frontage on Hines Road of 105 feet and is slightly over 1100 feet in depth. Immediately east of Block WC1 is another residential property owned by Mrs. Charbonneau, Civic No. 373 Hines Road, which is presently rented. The C.N.R. owns all the remaining lands on the south side of Hines Road shown on this map. On the north side of Hines Road opposite the Charbonneau lands are lands owned by the Department of National Defence forming part of the Shearwater Air Base.

On questioning from Counsel for the Appellants Ms. Spencer indicated that there were other changes made to the draft MDP and draft Zoning By-law as the result of submissions made to the Council on the occasion when the documents were approved by the Council.

Ms. Spencer in response to a question from the Board as to whether she thought that the Appellants' proposed use carries out the intent of the MPS said:

> "I don't see approval of a development agreement for this particular use as being consistent with the final purpose of the plan in trying to achieve good industrial development in Eastern Passage, good sound residential development in Eastern Passage, phasing out some of the messier uses over time in terms of industry. On the other hand, because the plan has identified so many exceptions to the rule which are there and which the council recognizes are there, I think that the council could approve an agreement."

Counsel for the Appellants asked Ms. Spencer:

> "It was the potentiality then of his having the scrap yard that was recognized by Council?"

to which Ms. Spencer answered: "Yes".

Additional planning evidence was given by Dorothy Cartledge a planner also employed by the Municipality. She testified that she is familiar with the Charbonneau/Sloane lands. She indicated that the lands relating to the Appellants' application to the Municipality are the two lots shown as Lot A3X and Block WC1 on page 41 of Exhibit C-3.

Mrs. Cartledge is the person who was asked to negotiate the terms of a development agreement with the Appellants in connection with the previous application for approval of a development agreement after the MPS was adopted. A copy of this draft agreement may be found at page 58, Tab 8 of Exhibit C-3. This draft agreement was negotiated in 1983 prior to the Council's decision of May 2, 1983, refusing to approve the agreement. Attached to this draft agreement as Schedules "C" and "D" are sketches showing parcels A3X and Block WC1 on which have been marked specific areas for salvage yard use. In the case of Lot A3X the salvage yard area is shown to be approximately 200 feet from Hines Road and in the case of Block WC1 the salvage yard area is located 65 feet back from the Hines Road and is 25 feet from the eastern and western boundaries of Block WC1 and 25 feet from the C.N.R. right-of-way on the south.

Mrs. Cartledge stated that most of the land on this portion of the Hines Road is wooded and the only houses are the two owned by Mr. and Mrs. Charbonneau. Opposite the subject properties on the north side of Hines Road are vacant lands of the Shearwater Air Base enclosed by a wire security fence.

When Mrs. Cartledge was asked by Counsel for the Appellants, if at the time she was negotiating the agreement with the Appellants she thought the agreement was consistent with the MDP, answered that it was consistent with the plan.

It was Mrs. Cartledge who had prepared the Staff Report dated November 23, 1983, directed to the Municipality's Chief Administrative Officer from the Chief of the Planning and

Development Department. It appears strange that Mrs. Cartledge on the one hand was of the opinion that the development agreement she had negotiated with the Appellants was consistent with the Municipality's MPS but on the other hand saw fit to recommend rejection of the latest application by the Appellants.

Counsel for the Appellants asked Mrs. Cartledge if she was aware of any request for reasons as to the Council's decision for refusing to approve the development agreement. She stated that several days after the hearing she had received a telephone call from the Appellants' solicitor in that regard. She stated further that to her knowledge Council did not produce reasons "other than what would have been considered under our Staff Report".

The Staff Report of November 23, 1983, is a one-page report setting forth the request of the Applicants to enter into a development agreement respecting Lot A3X and Block WC1 to permit the operation of a salvage yard. The report makes the following recommendation:

> "Due to two previous decisions of County Council to refuse to either rezone the properties or to enter into a development agreement to permit a salvage yard, staff recommends rejection of this request given that it is the same request and agreement refused in May 1982."

Mrs. Cartledge made it clear that no new development agreement had been negotiated as the result of the last application by the Appellants but the Staff Report did however include a copy of the development agreement negotiated under the previous application. A public hearing had taken place with respect to the previous application but not with respect to the latest one which is the subject matter of this appeal.

Although Mrs. Cartledge was of the opinion that the previously negotiated development agreement met the intent of the MDP she recommended rejection of the agreement on November 23, 1983. In her evidence Mrs. Cartledge stated that:

> "...the reason for including this old agreement in this report was to show committee that because there was no new information and because this old agreement had already been rejected we did not feel that it warranted further study or further negotiations or in fact even further consideration by Council".

On cross-examination by Counsel for the C.N.R. and Autoport Limited Mrs. Cartledge stated that in forming her opinion that the agreement was within the intent of the MDP (MPS) she had considered the overall governing principles set out in the plan but was of the view that the specific policy in the plan dealing with the Charbonneau properties would "override some of the more general policy statements relative to less specific things". She also stated that she considered the provisions of Policy P-88 of the MPS in assessing the Charbonneau development agreement.

On cross-examination by Counsel for the Municipality Mrs. Cartledge indicated that the MPS does not give a clear direction other than the Council has to consider the Appellants' proposed salvage yard use of lands. She also indicated that the Charbonneau requests have been consistently opposed by the local Councillor and by the residents. She indicated that the local Councillor (Deveau) was strongly opposed to the application in question.

Mrs. Cartledge stated that the two parcels of land in question are zoned Light Industry (L-1) and most of the surrounding land is zoned L-1. The lot owned by Mrs. Charbonneau on which is located the dwelling presently rented (Civic No. 373 Hines Road) is Zoned I-3 (Local Service) Zone. The Shearwater lands on the opposite side of Hines Road are Zoned D-1 (DND) Zone where the only permitted use is for "Canadian military installations".

The permitted uses in the I-1 Zone are the following:

> "Industrial Uses
>
> Any manufacturing, processing, assembly or warehousing operation which is not obnoxious and which is conducted and wholly contained within a building;
> Service industries;
> Marine, road, rail and pipe transportation uses;
> Railway related uses.
>
> Commercial Uses
>
> Any activity related to the automotive trade except a salvage yard;
> Commercial recreation uses;
> Outdoor display courts;
> Retail and wholesale stores;
> Shopping plazas and malls;
> Taxi and bus depots;
> Parking lots.
>
> Community Uses
>
> Open space uses;
> Industrial uses."

When asked if the proposed use of the two Charbonneau lots for salvage purposes was compatible with the D-1 use of the Shearwater lands on Hines Road, Mrs. Cartledge stated that in negotiating the agreement with the Appellants she had some concern that the proposed use might attract birds. This concern was addressed in the agreement by the prohibition of food, food wastes and garbage being placed on the subject sites.

Mrs. Cartledge explained the provisions in the negotiated agreement respecting buffering and fencing.

Evidence on behalf of the Appellants was given by G. Barry MacLellan, an inspector employed by the Board of Commissioners of Public Utilities. He stated he had inspected the subject properties further to an application by Mr. Charbonneau under the Salvage Yards Licencing Act, R.S.N.S. 1967, c. 276, and the site complies with the regulations made under that statute. He indicated that a hearing had been held by the Public Utilities Board in 1980 and a licence would have been granted had the zoning of the site allowed for a salvage yard use. Mr. MacLellan was of the opinion that the area could utilize a salvage yard and the subject property is good for this purpose because of the fact that it is bordered on three sides by trees and there are not many residences nearby.

The last witness to be called was Wilmer Charbonneau, one of the Appellants. He stated that he resides at 323 Hines Road and is presently in the Canadian Forces working at the Shearwater base. He desires to operate a salvage yard to supplement his income upon his retirement from the Services. He stated that the residentially used property located at 373 Hines Road is owned by his Wife and is presently rented. He admitted that he had been charged with an offence under the provisions of the Municipality's Unsightly Premises By-law but had never been convicted. He stated that in 1979 he approached the local ratepayers association which approved of his proposal to set up a salvage yard. He then applied to have his property rezoned and was refused because the Municipality's Zoning By-law did not make provision for a salvage yard operation only but also included a dump operation. He indicated that the C.N.R. and Autoport had endeavoured to purchase his lands but he had refused to sell.

After the hearing of the evidence the Board visited the subject properties owned by the Appellants on Hines Road and the general area in the vicinity of these properties.

Counsel on behalf of the Appellants, the Municipality and the C.N.R. and Autoport filed post-hearing submissions with the Board the last of which was received on June 19, 1984.

All three counsel were in agreement that the main issue is whether the decision of Council in refusing to enter into the proposed development agreement is reasonably consistent with the intent of the MPS for the Eastern Passage/Cow Bay area within the context of Section 72 s.s. (4) of the Planning Act.

Counsel for the Appellants argues that because the evidence of Dorothy Cartledge, a planning witness, indicates that she was of the view that the proposed development agreement complied with the intent of the MPS, it follows that the decision of Council is not consistent with the intent of the MPS. He also argued that since the Council had not given reasons contrary to the provisions of Section 72(2) of the Planning Act "the decision was arbitrary and without reference to the provisions of the Municipal Planning Strategy and therefore, inconsistent with the intent of the strategy." He also relied on the wording in the MPS specifically referring to properties of Mr. and Mrs.

Charbonneau (P-49) and to the wording of Appendix "Ba" in the Land-Use By-law which read together he considered clearly expressed the Council's intent to negotiate a development agreement and therefore its decision not to do so "must be inconsistent with the Plan."

Counsel for the Municipality submits in his brief that the "adoption of the development agreement in this instance would necessitate an appropriate amendment to the Zoning By-law for Eastern Passage/Cow Bay." He makes reference to Section 51(2) of the Planning Act in this regard. With respect the Board does not agree with this submission as it is of the opinion that a council may approve a development agreement pursuant to Section 55 of the Planning Act without amending the Land-Use By-law (Zoning By-law). When a Council approves a development agreement pursuant to Section 55 it is not thereby creating a new zone for a parcel of land but is permitting a specific use of the land upon terms set out in the agreement. The land owner then has rights and obligations set forth in the development agreement but his land still retains the precise category of zoning it enjoyed prior to the entering into of the development agreement.

Counsel for the Municipality submits that the Board should not interfere with the Council's decision "on the basis that the Appellant was not provided with the reasons for the decision in accordance with Section 72(2) of the Planning Act...". He further submits that the purpose of Section 72(2) "is to provide the Appellant with the statutory authority to seek redress pursuant to the appropriate legal application".

Counsel for the Municipality submits that the Council's decision was not inconsistent with the intent of the MDP (MPS) for several reasons.

Firstly, he submits that where a Council pursuant to Section 38(2)(p) of the Planning Act has adopted policies to allow for the approval of development agreements, Section 55 of the Planning Act places a duty on Council to identify in these policies the matters which Council shall consider prior to the approval of an agreement and the developments that are subject to agreement. He points out that in this case reference to Policies P-49 and P-88 should be made. He further points out that Section 45 of the Planning Act makes it clear that a Council is not committed to undertake projects outlined in the MPS if they are inconsistent with the planning strategy. He then concludes that a particular identified development requiring a development agreement "does not automatically entitle the developer to a development agreement".

Secondly, he argues that although Policy P-49 of the MDP(MPS) allows Council to consider a development agreement respecting a salvage yard for the Appellants' lands it is a permissive policy "and in no way establishes the Appellants' right to a development agreement".

Thirdly, he submits that because the wording of the initial portion of Policy P-49 uses the word "shall" as compared to the use of the word "may" in that portion of the policy relating to the Appellants' property "that the real intent behind the policy was to recognize existing uses, although Council did give Charbonneau the opportunity to apply for a development agreement in the future".

Fourthly, he points out that Policy P-88 of the MPS in accordance with Section 55 of the Planning Act sets forth the factors to be considered by Council and he quotes from these policies which state inter alia that Council shall have appropriate regard to a number of matters including, "(i) that the proposal is in conformity with the intent of this Plan and with the requirements of all other municipal by-laws and regulations". He then submits that based on Policy P-88 "the intent of the MDP must be obtained from an examination of the MDP as a whole and the policies set forth therein". He then specifically refers to Policies P-15 and P-17 which are particularly relevant. These policies read as follows:

> "P-15 With reference to Policies P-2 and P-51, it shall be the intention of Council, through zoning and other development control procedures, to recognize and accommodate the affects and requirements of the airport at CFB Shearwater.
>
> P-17 With reference to Policy P-46, it shall be the intention of Council to recognize the importance of and the opportunities offered by the Plan Area's waterfront."

He then concludes that the council's decision based on these policies was consistent with the MDP (MPS).

Fifthly, he submits that the purpose of a Land-Use By-law is to give effect to and implement the policies set out in the MPD. He then refers to appendix "Ba" of the Land-Use (Zoning) By-law which specifically refers to certain lands of Wilmer and Mary Charbonneau on Hines Road, and that intent is "to recognize existing uses and, in addition, allow Council to consider a development agreement in this instance and approve same provided the development was not inconsistent with the MDP".

Sixthly, he submits that because the Appellants' application dealt with by the Council on December 20, 1983, was identical to a previous application dealt with at a public hearing held on May 2, 1983, when Council weighed all relevant factors "there was no apparent reason for Council to review the factors again" on December 20, 1983.

Counsel for the C.N.R. and Autoport in his post-hearing submission addressed three issues, viz:

> "1) Was the County Council's refusal to enter into negotiations with Mr. Charbonneau consistent with the overall intent of the Municipal Development Plan and how is this intent to be garnered?
>
> 2) Does the failure of the County Council to give reasons justify interference by the Municipal Board?
>
> 3) Does the specific reference to the Charbonneau lands in the Municipal Development Plan support the assertion that salvage yard development is consistent with the Municipal plan strategy?"

His conclusion reads as follows:

> "In summary, Canadian National submits that the present appeal should not be allowed as the Council's refusal was consistent with the Municipal Development Plan for the area in question. It is acknowledged that Mr. Charbonneau was specifically referred to in the plan documents but such a reference cannot be elevated to a binding legal entitlement to contract development as he has submitted. Just as the parliamentary debates were relevant to a Supreme Court of Canada in considering the anti-inflation reference we submit that the proceedings before the County Council in debating the Municipal Development Plan are relevant to this Board in imputing plan intent. (See reference re: Anti-Inflation Act [1976] 2 S.C.R. 373). Read

> as a whole, and in light of the representations which were made to Council, the right given to Mr. Charbonneau was simply that of having his development proposal considered. The evidence adduced before the Board reveals that his development proposal was fully considered by County officials and the Council itself and was the subject of a full public debate. It is submitted the intent of the plan has been met and Mr. Charbonneau has not established a ground for Municipal Board interference."

It is clear from the evidence that Mr. Charbonneau has been at odds with the Municipality of the County of Halifax over a proposed salvage yard use by him of certain lands on Hines Road since at least 1979 when he applied to have some lands rezoned to Salvage and Dump (SD) Zone and his application was refused. He appealed the Council's decision to the Provincial Planning Appeal Board on April 29, 1980, and the hearing of that appeal was adjourned from time to time at the request of the Appellants. At the time of the 1980 decision by Council there was no MDP in effect to the subject area. This appeal was withdrawn by a Notice received by the Board on October 25, 1983.

The Appellants applied to the Municipality in August of 1982 to enter into negotiations for a development agreement to permit the operation of a salvage yard. Subsequently the Municipality's planning staff negotiated a development agreement with the Appellants and a public hearing was held by the Council on May 2, 1983, and the Council refused to enter into the development agreement. This refusal was appealed by the Appellants to this Board and that appeal was subsequently withdrawn after 1983 Planning Act came into force as it expressly permits an appeal to this Board from a decision of a Council refusing to enter int a development agreement.

The Board does not agree with Counsel for the Appellants that the Council should have approved the Appellants' application simply because the MPS and Land-Use By-law for the Eastern Passage/Cow Bay area have specific references to the properties owned by the Appellants. It is perfectly clear that the MPS in Policy P-49 authorizes Council to "consider a development agreement to permit the development of a salvage operation on the lands of Wilmer and Mary Charbonneau, Hines Road, as identified in Appendix 'Ba' of the Zoning By-law". (Emphasis added). There was evidence before the Board as to the reason why the Council added these specific references to the Appellants' properties at such a late time in the process of adopting a MDP (MPS) and Zoning (Land-Use) By-law. It is safe to say that these specific references were intended to accommodate the Charbonneaus in some manner. The question is - in what manner? These references were added virtually at the last minute before the MDP and Zoning By-law were adopted by the Council after representations were made to the Council on behalf of Mr. Charbonneau. Obviously their meaning is important in determining the intent of the MDP (MPS). The Board is of the view that Policy P-49 of the MDP by itself does not provide the Appellants with any right to have a salvage yard established on their properties. It does however open the door to the possibility of a development agreement being considered by Council. It seems reasonable to assume that the Council by inserting in Policy P-49 the specific provision relating to the Charbonneau properties at the very least contemplated that

Council could if it wished not only consider a development agreement but could enter into an agreement if the agreement was not inconsistent with the intent of the MDP. The mere fact that such a specific provision was inserted strongly suggests that a development agreement of some nature would be possible within the intent of the MDP.

It is a fact that the Land-Use By-law for the Eastern Passage/Cow Bay area states in appendix "Ba" that "notwithstanding anything else in this By-law" certain specifically named properties of Wilmer and Mary Charbonneau located on Hines Road "may be used for purposes of a scrap and salvage operation in accordance with the Municipal Development Plan for Eastern Passage/Cow Bay and Sections 33(2)(b) and 34 of the Planning Act". This provision in the Land-Use By-law appears to give Council the right to approve a salvage yard use for these properties despite the fact that these properties are presently zoned I-1 (Light Industry) Zone and the permitted uses under this zone include "any activity related to the automotive trade except a salvage yard". (Emphasis added). Appendix "Ba" therefore appears to have been included in the Land-Use By-law in order to permit Council, if it so desired, to approve a scrap and salvage operation for the Charbonneau lands despite the fact that this type of use was not an allowable as of right use under the I-1 Zone in effect for these properties.

The references to Sections 33(2)(b) and 34 of the Planning Act in the Land-Use By-law obviously refer to the 1969 Planning Act c. 16 which was in effect on September 8, 1982, which is the date that the Minister of Municipal Affairs approved the Zoning By-law for the Eastern Passage/Cow Bay area.

Section 33(2)(b) of the 1969 Planning Act provides that a Zoning By-law passed under Section 33 may:

> "Where the Municipal Development Plan so provides, provide that the council may by resolution approve any specific development requested which would not otherwise be permitted by the by-law, but no approval shall be given inconsistent with the municipal development plan."

Section 34 of the 1969 Planning Act provides inter alia that the approval by council pursuant to clause (b) of s.s. (2) of Section 33"

> "shall only be granted subject to the condition that the registered owner of the land upon which the development is to occur shall enter into an agreement with the council containing such terms and conditions as the council may direct."

On June 1, 1983, a new Planning Act, 1983, C. 9, came into effect which repealed the 1969 Planning Act, except Section 1 and Part IX. Therefore on October 11, 1983, when the latest application from the Appellants was received by the Municipality Sections 33 and 34 of the 1969 Planning Act were no longer in force.

Under the provisions of s.s. (4) of Section 72 of the Planning Act the Board is directed not to interfere with a decision of a council refusing to enter into a development agreement "unless the Board determines that the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy...". The Board therefore is obliged to examine the proposed agreement in the light of the intent of the MPS and this intent must be gathered from a perusal of the entire MPS.

The goal of the MPS is set out in Section I at page 10 and reads as follows:

> "It is the goal of this Plan to combine an understanding of the characteristics of two established and distinct communities, with the realities of development demands placed upon the Plan Area as a whole. In this regard, direction will be given to rationalizing the distribution of industrial use in Eastern Passage and providing a response to industrial development through support for the growth of a solid residential and business community, which is distinct from industrial locations".

In Section II of the MPS at page 24 reference is made to the airport located at Canadian Forces Base Shearwater which is said to be "one of the busiest in the country". After commenting on the airport's impact in the restriction of residential use within its noise zones, the MPS states that:

> "In addition to concerns about increasing residential development, which leads to conflict over noise and hours of airport operation, Shearwater representatives express concern regarding the location of flight paths relative to industrial developments which may emit smoke or ash or attract birds to disposal and scrap areas."

The Board is satisfied that the proposed development agreement adequately safeguards against birds being attracted to the proposed salvage yard sites in question.

It is noted that Policy P-18 on page 26 of the MPS states that it is the intention of the Council to establish certain roads, including Hines Road as a truck route within the plan area. This is in keeping with the Industrial (I-1) Zoning of most of the land in the vicinity of the subject properties.

The MPS in Policy P-49 at page 54 provides for the continuation of legally existing scrap or salvage operations identified in Appendix "B" of the Zoning (Land-Use) By-law. Council may consider the expansion of existing salvage operations in accordance with the provisions of Sections 33(2)(b) and 34 of the Planning Act (1969) and with regard to the provisions of Policy P-88 and that adequate lot area and "visual buffering" may be considered. As has already been noted Policy P-49 gives the Council the specific authority to "consider" a development agreement to permit a salvage operation on the Charbonneau lands.

The MPS in Section III refers to "Land Use Intent" and at page 30 states that "The Generalized Future Land Use Map (Map 1), illustrates eight land use designations which are intended to direct the pattern of future development within the Plan area. The designations reflect both existing uses and the potential for a transition of uses within an older suburban area". The Charbonneau properties are located on the Hines Road within a large area of land designated as "Industrial" on Map 1. At page 31, the MPS states that "The Industrial Designation reflects locations of heavy and service industry in the north end of Eastern Passage and provides for their expansion and for the development of complementary industrial and commercial operations. The designation defines a future industrial area and limits further industrial intrusion into the residential community."

The subject properties (lot A3X and Block WC1) proposed by the present owners for salvage use are presently zoned Light Industry (I-1). Although salvage yard uses are expressly prohibited under the permitted I-1 uses it appears to the Board that this type of use in an area already predominantly zoned I-1 is a compatible use providing that the areas to be so used are buffered and set back a reasonable distance from Hines Road. Since the MPS has expressly provided in Policy P-49 that Council may give consideration to a salvage operation on lands of the Charbonneaus, it follows that Council's intent was that such a use was possible within the intent of the MPS and the Council could allow such a use subject to a development agreement being negotiated.

The Board has examined the draft development agreement negotiated by the Municipality's staff in connection with the previous application by the Appellants and this agreement in the opinion of the Board is adequate for the purpose of establishing a salvage yard operation on the subject lands. The Appellants in making the application refused by the Council which is the subject matter of this appeal attached a copy of the previously negotiated development agreement to their application and made it a part of their application. The application states in part: "Attached to this application is a copy of an agreement the terms to which have been negotiated satisfactorily on a prior occasion by staff. The applicant requests that the Development Agreement be in the form annexed".

The Board notes that the proposed agreement in clause 1.2 of Part 1 requires the developers to construct an 8 foot fence on Lot A3X to serve as a visual barrier between the salvage yard operation and the Hines Road. The agreement provides in clause 2.2 of Part II that if any part of the salvage operation on Block WC1 becomes visable from Hines Road the developers shall construct and maintain an 8 foot fence.

The proposed agreement provides for minimum front, side and rear yards for Lot A3X in clause 1.1 of Part 1 and for Block WC1 in clause 2.1 of Part II.

The proposed agreement contains other clauses designed to ensure that the salvage yard operation will function in a manner compatible with the subject area.

The Board is satisfied that the proposed use of the Appellants' two parcels of land and the proposed development agreement are reasonably consistent with the intent of the MPS for the Eastern Passage/Cow Bay area and that the Council's decision not to enter into an agreement cannot reasonably be said to be consistent with the intent of the MPS.

The Board therefore allows the appeal and refers the matter back to the Council under the provisions of s.s. 4(a) of Section 72 of the Planning Act.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 27th day of September, A.D., 1984.

RHBlois

R.H. BLOIS,

D.W. WILSON,

MEMBERS, NOVA SCOTIA MUNICIPAL
BOARD.

Pioneer Ready Mix Limited v. County of Cape Breton

PLANNING--ZONING--AMENDMENT--REFUSAL TO REZONE FROM C-6 TO M-2 TO PERMIT CONCRETE PLANT--WHETHER INCONSISTENT WITH OR UNNECESSARY FOR THE PROTECTION OF THE BEST INTERESTS OF THE MUNICIPALITY--WHETHER UNDUE HARDSHIP OR EXTRAORDINARY AND COMPELLING CIRCUMSTANCES--PLANNING ACT, Ss. 63(1),(4),(6),(7)

This is an appeal from a decision of the Council of the Municipality of the County of Cape Breton refusing to rezone 6.24 ac. of land on the Marion Bridge Highway at Prime Brook from Commercial 6 (C-6) to Industrial 2 (M-2) to permit the operation of a concrete plant. Directly across the Highway are lands in residential use and zoned residential. There is no Municipal Planning Strategy (MPS) in effect. The Appellant presently operates a concrete plant on leased land in the City of Sydney and is desirous of modernizing and expanding its facilities. The Sydney site is inadequate for this and the subject site was selected after consulting with the staff of the Cape Breton Metro Planning Commission. Two other existing sites are presently zoned to permit the proposed use, but these were rejected by the Appellant for various reasons. The Planning Staff of the Planning Commission recommended that the application be approved.

HELD--The appeal is dismissed. The decision of Council is confirmed.

In an appeal under s. 63(1) of the Planning Act, where no MPS is in effect, the Board must first determine whether or not Council's decision was inconsistent with or unnecessary for the protection of the best interests of the municipality. If the Board finds the decision was not inconsistent or unnecessary for the protection of the best interests of the municipality it could nevertheless allow the appeal under s. 63(7) if the

Board is of the opinion that either the applicant "would suffer undue hardship" or "extraordinary and compelling circumstances are present". The proposed use is a matter of geniune concern on the part of the area residents. The property has a frontage of 467.50 ft. on an extremely busy highway directly opposite a well established residential subdivision clearly within sight of at least five of the dwellings. The County's Land-use By-law permits in Industrial 2 (M-2) zones, inter alia, asphalt plants, extractive resource industries, pulp and paper industries, salvage yards and sanitary landfill sites. In the Board's opinion the requested M-2 zoning would not be appropriate for the subject site as the permitted uses would not be compatible with the existing C-6 uses let alone the residential uses in the vicinity. The Appellant requests, if an M-2 zone is not appropriate, that the Board instruct Council under s. 63(4)(c) to create a new M-3 zone which will permit all of the uses allowed under the C-6 zone but in addition permit the Appellant to have open storage of sand and gravel. Neither of the planning reports deals adequately with the legitimate concerns of the residents, nor do they indicate any community or municipal need to have the Appellant's concrete plant established at this particular site. Increased assessment is not a valid reason for permitting this use. As to undue hardship and extraordinary and compelling circumstances, the Appellant did not deal with these in his post-hearing submission and the Board finds no undue hardship or extraordinary and compelling circumstances.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Statutes of Nova Scotia, 1983, Chapter 9,

- and -

IN THE MATTER OF: An Appeal by PIONEER READY MIX LIMITED from the decision of the Municipality of the County of Cape Breton made April 24, 1984, refusing to amend the Municipality's Land-Use By-law by rezoning a 6.24 acre parcel of land at Prime Brook from Commercial 6 (C-6) Zone to Industrial 2 (M-2) Zone.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: GUY LaFOSSE, LL.B and J.B. BOUDREAU, LL.B for the Appellant;

DAVID N. MUISE, LL.B and DAVID PARKER, Articled Clerk for the Municipality of the County of Cape Breton;

CLYDE A. PAUL, LL.B, for the Municipal Board.

DECISION

This is an appeal under Section 63(1) of the Planning Act, Statutes of Nova Scotia, 1983, c. 9, from the decision of the Council of the Municipality of the County of Cape Breton made on April 24, 1984, refusing to approve the Appellant's application to amend the Municipality's Land-Use By-law by rezoning from Commercial 6 (C-6) Zone to Industrial 2 (M-2) Zone a parcel of land situate on the east side of the Marion

Bridge Highway at Prime Brook so as to permit the operation of a concrete plant. The subject lot contains 6.24 acres and is shown as Lot No. 105 on a plan of subdivision of Lands of Prime Brook Development Company Limited approved by the Development Officer for the Municipality on January 13, 1984.

At the commencement of the hearing, Counsel for all parties were in agreement that the appeal was regularly and properly before the Board. The Board assumed jurisdiction and heard the appeal on the merits.

The Appellant is presently operating a concrete plant and pre-cast plant on leased land at Battery Point in the City of Sydney, which land the Appellant believes is not now suitable for its business function. The Appellant owns two adjoining parcels of land, Lots 104 and 105 in the Prime Brook Subdivision at Prime Brook which is approximately two miles from the limits of the City of Sydney. Lot 104 contains two acres of land and is situate on the Sydney-Marion Bridge Highway south of Lot 105.

The subject Lot (No. 105) is located in an area zoned Commercial 6 (C-6) Zone which is directly across the Marion Bridge Highway from lands in residential use and zoned residential.

At all relevant times there was no Municipal Planning Strategy in effect in the Municipality. There is a Land-Use By-law in effect, a copy of which was filed as Exhibit P-5.

The Appellant's original Notice of Appeal is dated May 8, 1984, and was received by the Board on May 10, 1984. The Board, pursuant to its Rules of Practice and Procedure, wrote to the Appellant on May 10, 1984, indicating that the Notice of Appeal did not fully comply with the Board's Rules of Practice and Procedure and instructed the Appellant to file an "Amended Notice of Appeal". The Board received an Amended Notice of Appeal from the Appellant on May 24, 1984.

The Appellant's Amended Notice of Appeal, filed as Exhibit P-2 sets forth the following grounds of appeal:

> "1) That the decision of the Cape Breton County Council is inconsistent with the protection of the best interests of the Municipality of the County of Cape Breton;
>
> 2) That the decision of the Cape Breton County Council is unnecessary for the protection of the best interests of the Municipality of the County of Cape Breton;
>
> 3) That the decision of the Cape Breton County Council will result in the Appellant's suffering undue hardship;
>
> 4) That extraordinary and compelling circumstances are present which justify the allowance of this appeal".

The hearing of the appeal took place on June 26th and June 27th, 1984, in the Council Chambers of the Municipality of the County of Cape Breton.

Evidence was given by Joseph P. Shannon, the President of the Appellant Company, Mike E. McCormick, a retired real estate developer, Donald Poole, a planning technician employed by the Cape Breton Metro Planning Commission, Douglas Foster, Director of Planning, Cape Breton Metro Planning Commission, James McNeil, a resident of Gordon Whitney Drive, Prime Brook, Mrs. Ann Dares, a resident of Prime Brook and George MacLeod, a Municipal Councillor for District No. 4.

Mr. Shannon stated that the Appellant manufactures concrete and pre-cast concrete products and distributes them to customers in Cape Breton County from a site at Battery Point in the City of Sydney. Mr. Shannon purchased the company in July of 1983. The present site of the company's operation is about 3 acres in size and is rented from the C.N.R. on a monthly basis. The rental arrangement may be cancelled by either party on thirty days' notice. This operation consists of a batch plant, a pre-cast plant and a garage and office. The batch plant requires the use of rock and sand aggregates. These aggregates are obtained from an area in Cape Breton known as the "Meadows" in a 25-ton dump trailer. This truck goes from the Meadows Road to the City plant by way of Highway No. 4 and the Kings Road, a Sydney street. This route is through a mix of commercial and residential areas but mostly residential. Eighty percent of the Company's market is in Cape Breton County. There are fifteen employees, thirteen of whom reside in the Municipality of the County of Cape Breton and two in the City. The company normally keeps two days' supply of aggregates on site but during the months between November and May the company keeps on hand a stock pile sufficient for this entire period. All materials are pre-washed at the Meadows so as to minimize the effects of dust at the operational plant site.

Mr. Shannon stated that his company had received no complaints from the City of Sydney, area residents or the Department of Environment about the present operation. He said the previous owner of the Company had unsuccessfully tried to buy the site from the C.N.R.

Mr. Shannon stated that he wants to modernize and expand his company's operation at a new site as the cost of delivery from the present site is too high. In his efforts to locate a new site he approached several real estate firms and went to the Metro Planning Commission for assistance. He was informed by Douglas Foster, the Director of Planning that there were only two areas in the County which were zoned to accommodate this type of operation, namely Sydport, an industrial park, and a large tract of land at the Meadows where the aggregates are obtained. Mr. Shannon's company purchased the subject lot No. 105 knowing it was zoned commercial 6 (C-6) Zone and would require an amendment to the Land-Use By-law to permit the proposed use.

Mr. Shannon was of the opinion that both the Sydport and Meadows sites are too remote from the Sydney By-pass to be seriously considered as sites for a concrete plant. He also stated that the Meadows Road site is a problem because the roads are closed for two months in the spring. He further stated that there were only two sites available in the County that were close to the By-Pass and they are located on Keltic Drive and the subject site at Prime Brook. Both of these sites are zoned C-6 and would require an amendment to the Land-Use By-law to accommodate the proposed concrete plant operation. He also stated that the Keltic Drive site owned by Day & Ross is a very expensive parcel of land.

The Appellant had a transportation time comparison and transportation cost analysis prepared and filed as Exhibit P-6. This exhibit sets forth the time in minutes to transport concrete from four sites to three delivery points in Sydney Mines, Glace Bay and Sydney River including the return trip but not including time required for off-loading. The four sites are:

1. Battery Point, Sydney;
2. Prime Brook;
3. Point Edward Industrial Park (Sydport); and
4. Meadows Road.

The total time from Battery Point was 148 minutes; from Prime Brook was 102 minutes; from Point Edward Industrial Park was 172 minutes and from Meadows Road was 192 minutes. Also forming part of Exhibit P-6 is a Schedule showing comparitive transportation costs from each of the four sites indicating that the cost of transportation from the other three sites is considerably higher than from the Prime Brook site.

Mr. Shannon indicated that the main advantages of the Prime Brook site are:

1. Its proximity to the Trans Canada Highway;
2. A larger parcel of land;
3. The availability of all weather roads to the site;
4. The fact that there were other large commercial businesses already located on the same side of the Marion Bridge Highway near the subject site, namely: Day & Ross Transportation; a woodworking factory, a store, Lingan Construction, forged steel plant and the Doug Burns Construction Company.

Mr. Shannon stated that there is one building constructed on the subject lot at a cost of $280,000.00 and this building is presently rented. His intention, if the appeal is allowed is to have three buildings on the subject site, a vehicle maintenance building near the highway, an office building and a building to house the batch plant. An architect's site plan showing the location of these buildings on the subject lot was filed as Exhibit P-9. Mr. Shannon pointed out that the proposed concrete plant is a much cleaner operation than an asphalt plant. He was of the opinion that his company would not generate any more traffic than the Day & Ross operation located on the adjacent site to the north. The number of his Company's vehicles would remain at 10. He indicated that the stock pile of materials would be located behind the buildings towards the back of the lot.

Mr. Shannon mentioned the concerns expressed by area residents which he considered unfounded. They were firstly that the Industrial 2(M-2) Zone would allow such uses as:

a) an asphalt plant;
b) a sanitary land-fill operation;
c) a gravel pit and
d) a scrap yard.

He stated he would be quite satisfied if his company would be allowed to operate a concrete plant on the subject site and also enjoy all of the permitted uses in a C-6 Zone.

Secondly, the residents expressed concern over the possibility of dust pollution.

Thirdly, they were concerned over the size of the stock piles of materials to be used in the operation.

Fourthly, they expressed concern over the emission of cement dust from the plant. He assured the Board that there would be no dust due to modern methods of delivering cement to the plant.

Fifthly, they expressed to him their concern over possible noise from the proposed operation which he stated would be minimal.

Mr. Shannon pointed out that another company, Municipal Ready Mix, operates in Sydney River on a site surrounded by residential properties and the same situation prevails in downtown Truro and there apparently are no problems for the residents from these operations. He stated that the proposed plant would have more environmental protection devices than his existing plant and the only environmental problem would result from the wash-out process for the trucks. In this regard he said that the Department of Environment requires the installation of a settling pond.

On cross-examination Mr. Shannon admitted that the nearest residence to the Battery Point site is approximately a quarter of a mile away. He also stated that his company's dump trailer makes 7 - 8 trips per day from the Meadows area to Battery Point and the same number of trips would likely be required at the subject site. He also admitted that his company had not obtained a building permit with respect to the building on the subject site. On cross-examination he admitted that the Appellant had not made any inquiries about the availability of land in the Meadows Road area. Mr. Shannon stated that the only thing favourable to a site on the Meadows Road was the fact that it was presently zoned M-2. He indicated that approximately 20% of the Appellant's business was from the sale of pre-cast concrete products.

On cross-examination Mr. Shannon stated that the pre-cast concrete blocks manufactured by his company would be stored in the open on the site and cement used in the production of concrete would be stored in a silo to be located near the proposed plant.

Counsel for the Appellant called as his next witness Mike E. McCormick, a part time real estate developer and resident of Prime Brook. He was the developer of the residential subdivision across the road from the subject site known as McCormick Park. He had been the owner of a 329.94 acre parcel of land including the highway and the McCormick residential subdivision on the west side of the highway as well as the subject lot and other lands zoned Commercial 6 on the east side of the highway. A copy of a survey plan showing the 329.94 acre parcel of land was filed as Exhibit P-10.

Mr. McCormick developed the residential subdivision known as McCormick Park on the west side of the highway. He sold the balance of his 329.94 acre parcel of land located on the east side of the highway to Prime Brook Development Company Limited. He lives on Kilarney Crescent which is directly opposite the subject site. He expressed the view that the existing commercial development on the east side of the highway has not adversely affected the price of lots in his subdivision or the re-sale value of lots with dwellings. He also was of the opinion that the additional truck traffic which would be generated by the proposed development on the subject site would not seriously affect the already large volume of traffic on this highway. He stated that trucks en route to the sanitary landfill site pass the subject property. As a resident of McCormick Park he has no objection to the proposed concrete plant operation. He pointed out that the land on the east side of the highway including the subject lot had been rezoned in 1976 from a Residential Zone to Commercial 6 (C-6) Zone and that there are no sidewalks on this highway. He was of the opinion that additional commercial assessment for the subject site is likely to reduce the residential tax rate and induce the Municipality to install water and sewer services in this area.

On cross-examination Mr. McCormick stated that he was the person who had applied for the 1976 commercial zoning of the land on the east side of the highway. He also stated that there are 19 homes including mobile homes in McCormick Park. He stated that there were 75 homes between the Sydney By-Pass and the Brooks Haven Playground on the east side of the highway.

Evidence was given by Donald Poole a planning technician employed by the Cape Breton Metro Planning Commission for the past four years. Previously he was employed as a planning technician in Truro for 3 years, worked for a private firm for 1 year, worked for 3½ years as a planning technician with the Department of Municipal Affairs. He does back-up work for planners and has been engaged for the past 1½ years in the preparation of rezoning reports used in connection with applications for rezoning. He normally visits the site and makes a visual inspection. He considers rezoning applications to see if there are potential conflicts with adjoining land uses. In this regard he checks the following:

1. Visual appearance;
2. Noise;
3. Dust; and
4. Transportation.

He then prepares a report and submits it to Douglas Foster, the Director of Planning.

Mr. Poole stated that he has visited the subject site about 5 times. From a visual point of view he recommended that the proposed plant for the subject site be re-located back from a distance of 200 feet to 340 - 370 feet from the highway. In his opinion the proposed use is compatible with the existing allowable commercial uses in a C-6 Zone. In his opinion the traffic problems on the highway would be just as great with the existing C-6 zoning as with the proposed M-2 zoning. He stated that there were very few industrially zoned areas in the County.

On cross-examination Mr. Poole indicated that he does not consider the subject site to be suitable for an asphalt plant operation. However, he was of the opinion that rezoning either to an M-2 or M-3 Zone would be in the Municipality's best interests. It is noteworthy that an asphalt plant is an allowable use in an M-2 Zone.

Douglas Foster, the Director of Planning employed by the Cape Breton Metro Planning Commission was called to give evidence on behalf of the Appellant. Mr. Foster is well qualified as a planner and has had extensive experience in planning. He stated that he had been consulted by Mr. Shannon and a Mr. Bonner who were looking for a possible site for their concrete business. He determined that the Sydport and Meadows Road areas were the two primary areas properly zoned to accommodate a concrete plant operation. Mr. Foster stated that access to the Sydney By-Pass road was an important consideration in the proposed re-location. He stated that neither the Sydport nor the Meadows Road areas were within a reasonable distance of the Sydney By-Pass. Mr. Foster pointed out two difficulties with the Sydport location, namely the distance of travel and the fact that you could only lease land and not purchase it. He pointed out that there are two routes to Sydport, one being via Westmount Road and Murphy Road which is not an all-weather road. The other route being by way of the Point Edward Road which is an all-weather road but requires more travel because of the greater distance. He stated that the Meadows Road site is too far from the By-Pass and is not an all-weather Road.

Mr. Foster was of the opinion that a modern concrete plant is not an obnoxious use of land. He pointed out that the Municipal Ready-Mix Concrete plant in Sydney River is within 150 feet of residences and that there has been further residential development in that area since the plant has started operating. He was of the view that there could be more traffic problems from the present C-6 uses near the subject site than from the proposed use. He could not forsee any problems caused by dust or from pollution. In his opinion a concrete plant would be one of the more pleasing uses in the area. He was of the opinion that the Council's decision was not in the best interest of the Municipality.

Mr. Foster mentioned that his staff had prepared two planning reports for the Municipal Council concerning the Appellant's application,both signed and approved by him. The first report was prepared by Mr. Donald Poole,the planning technician,and is dated March 12, 1984, a copy of which was filed with the Board under Tab 7 of Exhibit P-4. This report concludes with the following recommendations:

> "The area chosen by the applicant is one of two areas with potential for this type of land use. The five homes across the highway are visible to the proposed site but the remaining homes in that subdivision do have a natural buffer, with the trees in the subdivision screening the proposed site. If industrial development is to take place in the County - until such time as Planning Strategies or Industrial Parks are developed - this site is one of the more favourable sites."

The second report is dated April 19, 1984, and it also was prepared by Mr. Poole and approved by Mr. Foster. A copy of this report appears under Tab 9 of Exhibit P-4. This report states that there have been a number of developments since the previous report. Firstly the area residents held a meeting on April 11th to discuss the proposed zoning amendment. The local councillor and representatives from Metro Planning and the Appellant were in attendance. The Planning Advisory Committee (PAC) met on April 17, 1984, to further discuss the application. It had previously met on March 12, 1984, when it passed a motion recommending to the Council that a public hearing be held in connection with the application. At the April 17th meeting, the PAC decided to ask the Applicant if it would consider an amendment of the Zoning By-law to a less permissive zone than the Industrial 2 (M-2) Zone to be designated as an Industrial 3 (M-3) Zone. The applicant agreed to this proposal. This M-3 Zone would allow those uses already permitted in the Commercial 6 (C-6) Zone with the additional use of a concrete plant with outdoor storage of sand and gravel. The report recommended the creation of an M-3 Zone.

On cross-examination Mr. Foster admitted that he was aware that there were plans underway to make Sydport more accessible by way of a new all-weather highway. The proposed location of the highway was marked by Mr. Foster in black on a copy of the Cape Breton County Zoning Map filed as Exhibit P-5. This proposed road would run from the Sydney By-Pass in a north easterly direction directly to the Industrial 2 (M-2) zoned lands known as Sydport. On being asked when this proposed road would be a reality, Mr. Foster stated he didn't know but it had been recommended by a number of bodies. Mr. Foster then stated that in his opinion it was in the best interests of the municipality to locate industries in Sydport but not all industries. On cross-examination Mr. Foster was shown a copy of a planning report prepared by his office in July, 1982, in connection with the M & S Paving Company's application for Industrial 2 (M-2) Zoning for lands in the Meadows Road area and the report recommended rezoning from Agricultural 2 to Industrial 2 (M-2) to permit the establishment of an asphalt plant. He was then asked why he didn't recommend the re-location of the Appellant's concrete plant to the Meadows Road area. His answer was that the Meadows Road area was too remote and was not accessible by way of an all-weather road.

Evidence on behalf of the Municipality was given by James McNeil, a resident of Gordon Whitney Drive, a street in the McCormick Subdivision in Prime Brook. He is opposed to the rezoning of the subject property to M-2. He assisted in the preparing of a hand-drawn rough map of the Sydney - Marion Bridge

Highway between the Sydney By-Pass on the south and a recreational site (Brooks Haven) on the east side of the highway on the north. This map was tendered as Exhibit P-15. On this map Mr. McNeil located various homes and other uses on the highway as well as homes on Gordon Whitney Drive. He had presented a brief to the Municipal Council which was similar to the one he presented to the Board as Exhibit P-17. He has lived in the McCormick Subdivision for three years. His brief focused on his concept of community life. People built in the subject area because it was close to the City but enjoyed a tranquil rural setting. He pointed out that as a result of a 1975 rezoning decision, the area on the east side of the highway opposite his subdivision was zoned to Commercial 6 which helped to change the tranquility of the area. He did not want to add to what he described as "turmoil" due to the heavy traffic. He stated that his children go to a school on the Sydney - Marion Bridge Highway near the Sydney By-Pass about three-quarters of a mile from the subject site and many children walk along the highway which has no sidewalks. He expressed concern over the possibility of noise pollution caused by trucks. He also was concerned over possible air pollution from the burning of oil used in the heating of the materials used in the production of concrete. Finally he expressed concern over possible dust pollution of the air from the sand and gravel to be stored on the site. While admitting that there may not be suitably zoned lands with good access to the By-Pass, he considered that "spot zoning" was not the answer. His main concern seemed to be:

1. Safety for children caused by the heavy traffic on the highway and the fact that there are blind spots on the highway

near the subject site;

2) devaluation of his residential property; and

3) the loss of the rural setting.

Evidence was given by Mrs. Ann Dares, who has lived directly opposite the subject site for 14 years. She has 2 children and expressed concern about the safety of her children because of the traffic. She also expressed concern over the possible decrease in her property's value and over the possible effects of dust and noise at the subject site. She stated there were 115 children who lived in the area between the Sydney By-Pass and the Brooks Haven Recreational Centre. She had been involved in the circulation of a petition signed by a large number of residents of Municipal District No. 17 objecting to the proposed rezoning of the subject site to permit the operation of a concrete plant. A copy of this Petition was tendered as Exhibit P-18.

On cross-examination Mrs. Dares was asked what steps she had taken to obtain sidewalks for her area. She indicated that she had not taken any.

The final witness was George MacLeod a Municipal Councillor for District No. 4 which is about 5 miles from the subject site on the opposite side of the City of Sydney. He had voted against the proposed rezoning at the Council meeting because he was concerned about the existing traffic conditions in the subject area. He was opposed to the introduction of industrial uses in a residential area.

The Board visited the subject site and vicinity at the time of the hearing of the appeal.

As this is an appeal under s.s.(1) of Section 63 of the Planning Act, Statutes of Nova Scotia, 1983, c. 9, and since there was no Municipal Planning Strategy (MPS) in effect at the time of the Council's decision, the Board is governed by the provisions of s.s. (6) and s.s. (7) of Section 63 which read as follows:

> "(6) Where there is an appeal from a decision of council with respect to a zoning by-law in force by Section 112, the Board shall not interfere with the decision unless the decision of the council is inconsistent with or unnecessary for the protection of the best interests of the municipality.
>
> (7) Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,
>
> a) the applicant would suffer undue hardship; or
>
> b) extraordinary and compelling circumstances are present."

The Board therefore must first determine whether or not the Council's decision was inconsistent with or unnecessary for the protection of the best interests of the municipality. If the Board finds that the decision was not inconsistent or unnecessary for the protection of the best interests of the municipality it could nevertheless allow the appeal under s.s. (7) of Section 63 if the Board is of the opinion that either the applicant "would suffer undue hardship" or "extraordinary and compelling circumstances are present".

The facts are not in dispute, the Appellant presently operates its concrete plant on leased land in the City of Sydney and is desirous of modernizing and expanding its facilities.

The appellant considers the present site in the City of Sydney to be inadequate for purposes of expansion and has selected the subject site for that purpose after consulting with the staff of the Cape Breton Metro Planning Commission. Two other sites presently zoned to permit the proposed use were rejected by the Appellant for various reasons outlined in this decision. The subject site although satisfactory from the Appellant's point of view is presently zoned Commercial 6(C-6) and does not permit the uses proposed by the Appellant. There is no question that the subject site is a much better one from the Appellant's point of view than the existing one in the City.

Although the Council of the Municipality rejected the Appellant's application for rezoning, the Planning Staff of the Cape Breton Metro Planning Commission recommended that the application be approved. The first staff report recommended approval of the rezoning of the subject site to Industrial 2(M-2) Zone with a setback of 340 feet to 370 feet from the highway. This report pointed out that in the opinion of the authors of the report "there were no other suitably zoned sites available that could possibly meet the needs of the applicant." The report emphasized the Appellant's need to have a location properly zoned and with good access to the Sydney By-Pass. This report did not adequately address the potential ill effect the rezoning might have on the residentially zoned and used properties on the west side of the highway although it did point out that the subject site would be visible to the five houses directly across the road and that the remaining homes would have a natural buffer of trees "screening the proposed site".

The second planning report after referring to a meeting held on April 11, 1984, at which residents' concerns were aired, recommended that a "new less permissive Industrial 3 (M-3) Zone" be created by an amendment to the Zoning By-law (Land-Use By-law) "allowing the use of a concrete plant with outdoor storage of sand and gravel as well as those uses already permitted in the Commercial 6 Zone". The report stated that the Planning Advisory Committee felt this form of zoning could satisfy more residents than the M-2 Zone and would be satisfactory to the Appellant.

Counsel for both the Appellant and the Municipality filed post hearing submissions, the last one having been received by the Board on July 9, 1984.

Counsel for the Appellant in his submission urged the Board to allow the appeal and instruct the Council to amend the Municipality's Land-Use By-law by the creation of an Industrial 3 (M-3) Zone. He argued that this type of zoning would be satisfactory to the Appellant and was recommended by the Metro Planning Commission and by the PAC. He referred to two decisions of the Provincial Planning Appeal Board (PPA Board) as precedents where that Board created new zones. He also referred to the Lord Nelson Hotel Limited appeal also a decision of the PPA Board in which that Board stated that:

> "the best interests of the Municipality is to be interpreted in the light of planning considerations and that the main guidance is to be obtained from professional qualified planners in various fields such as urban economics, urban design, city planning, etc.".

He then argued that this Board should accept the expert planning testimony given by Douglas Foster the Director of Planning and Donald Poole the planning technician who recommended in favour of rezoning the subject property to the proposed M-3 Zone.

Counsel for the Appellant pointed out that under the existing C-6 Zone all uses permitted in the Industrial 1 (M-1) Zone are inter alia permitted. He then argued that many of the permitted uses in a C-6 Zone "have a greater potential to be objectionable to local residents than" a modern concrete plant. He pointed out that if the projected capital expenditures of $500,000.00 proposed for the subject site were made this would result in an increase in the commercial assessment for the Municipality. He argued that a new modern concrete plant would be pollution-free and aesthetically pleasing in comparison to other industrial uses. He based this portion of his argument on the testimony of Mr. Foster and Mr. Shannon. He also pointed out that there were no concerns from residents in the vicinity of the Municipal Ready Mix plant in Sydney River as to that plant's operation.

In connection with the area residents' concern about increased traffic and safety, Counsel for the Appellant argued that the evidence indicated that the proposed plant operation would generate "no more than twenty trips per day" and therefore this additional traffic "would have little, if any, significance or impact on the present traffic count." He further argued that the potential for significant increases in traffic is much greater with the existing permitted uses than with the proposed uses.

Counsel for the Appellant argued that there was "no objective evidence" to back up the claim by Mrs. Dares and Mr.

MacNeil that their properties would be devalued by the operation of a concrete plant on the subject site. He also argued that since the east side of the highway was presently zoned to permit light industrial uses and since these types of uses are now in effect, the character of the neighbourhood would remain the same even if the rezoning did not take place.

Counsel for the Municipality in his submission argued that the Council's decision was in the best interests of the Municipality and quoted the same two paragraphs from page 31 of Vol. 1 of the PPA Board reports as were quoted by Counsel for the Appellant.

Counsel for the Municipality referred to two planning decisions relating to appeals from decisions of the Council of the Municipality of the County of Cape Breton. Firstly, he referred to the appeal by Reashore and Stubbert respecting the Council's decision to rezone land from Residential 3 and Agricultural 2 Zones to Commercial 1 Zone to permit the operation of a drive-in theatre. In that case reported in Vol. 12, page 1745 of the PPA Board Reports, the Board reversed the Council's decision to allow the rezoning, notwithstanding that the Metro Planning Commission had recommended approval.

Secondly, he referred to the M & S Paving Company Limited case reported in Vol. 2 of the Municipal Board Reports at page 431. In that case the Board on an appeal from the Council's decision refusing to rezone, instructed the Council to rezone a 64-acre parcel of land in the Meadows Road area of the Municipality from (R-6) and A-2 to Industrial 2 (M-2) to permit the establishment of an asphalt plant. The Metro Planning Commission had recommended in favour of the rezoning.

Counsel for the Municipality quoted most of the following extract from the M & S Paving decision found at page 453:

> "The Board in determining the entire 64-acre parcel should be rezoned to M-2 does so not because it presumably would give an economic advantage to the Appellant who intends to establish an asphalt plant on a portion of this large site, but because it appears to be in the best interests of the Municipality to establish an Industrial M-2 Zone for this site in order to encourage industrial M-2 development on a site that is reasonably remote from existing residential uses and is of sufficient size and depth that it would accommodate industrial uses in such a manner that they would have no or relatively little detrimental effect on the existing residential uses. Furthermore, the Municipality would presumably derive some additional tax revenue from the site after some industrial uses were established."

The facts in the M & S Paving case are quite different from those in this case and because of the differences in the facts it is the opinion of the Board that what was appropriate in the M & S Paving case for M-2 Zoning is not appropriate in this case. At page 455 the Board made this observation in the M & S Paving decision:

> "The Board notes that the area to be rezoned has very little frontage on the Meadows Road. It does have a narrow frontage in two places on either side of a residential property owned by Nissen which bears the L.R.I.S. number 150 40778. This property is approximately 700 feet from the nearest portion of the 4.85 acre parcel of land on which the Appellant plans to construct an asphalt plant. Because of its narrow frontage on the Meadows Road industrial development on the site would in all probability be quite remote from the Meadows Road and would therefore not be as conspicuous as it would

> be on land with a large frontage on Meadows Road. In other words, the site is one where industrial uses could occur on lands sufficiently remote from the highway and residential development so as to have a minimum effect on the residential developments. The Board notes that both of the existing asphalt plants are located in close proximity to the Meadows Road and are clearly visible from this Road."

In the case at hand the subject property has a frontage of 467.50 feet on an extremely busy highway directly opposite a well established residential subdivision clearly within sight of at least five of the dwellings in the McCormick Subdivision. Although the Board accepts the evidence of Douglas Foster that it is possible to design and construct a concrete plant which would be aesthetically pleasing and environmentally not harmful, nevertheless the Appellant proposes to stock pile sand and gravel on the site in open storage. This proposed use of the site is a matter of genuine concern on the part of the area residents.

The Municipality's Land-Use By-law in listing the permitted uses in an Industrial 1 (M-1) Zone (which are permitted uses in the M-6 Zone which presently applied to the subject site) expressly excludes "the bulk storage of sand or gravel".

The permitted uses in an Industrial 2 (M-2) Zone cover a wide range. These uses are as follows:

> "All uses permitted in the M-1 Zone,
> subject to the M-1 Zone requirements
> Asphalt plants
> Any manufacturing, processing, assembly
> or warehousing operation requiring
> outdoor storage
> Bulk storage of sand and gravel

Extractive resource industries
Pulp and paper industries
Salvage yards
Sanitary landfill sites"

It is the Board's opinion that the requested M-2 zoning would not be appropriate for the subject site as the permitted uses would not be compatible with the existing C-6 uses let alone the residential uses in the vicinity of the subject site.

The Appellant has requested the Board "to rezone Lot 105 to an appropriate zone which would permit Pioneer to locate its concrete plant with outside storage on its land. This rezoning could be accomplished by creating a new M-3 zone and making some additional text amendments as recommended by Metro Planning". In other words, the Appellant is saying to the Board that it applied to the Council for M-2 zoning which was refused and if the Board is of the opinion that M-2 is not appropriate then instruct the Council under s.s. 4(c) of Section 63 of the Planning Act to create a new M-3 Zone which will permit all of the uses allowed under the C-6 zone but in addition permit the Appellant to have open storage of sand and gravel on the subject site.

The Board has reviewed the evidence adduced at the hearing, has visited the subject site and vicinity and has perused the post-hearing submissions of Counsel and is of the opinion that the Appellant has not discharged the onus on it of establishing that the Council's decision is either inconsistent with or unnecessary for the protection of the best interests of the Municipality of the County of Cape Breton and therefore the Board is obliged not to interfere with the Council's decision in compliance with the provisions of s.s. (6) of Section 63 of the Planning Act, Statutes of Nova Scotia, 1983, c. 9 and also the provisions of Section 28 of the Municipal Board Act, Statutes of Nova Scotia, 1981, c. 9.

The only cogent evidence before the Board in support of the Appellant's contention that the Council's decision was inconsistent with the best interests of the Municipality is the evidence of the Director of Planning, Douglas Foster, who along with Donald Poole the planning technician recommended firstly that Council rezone the Appellant's property to M-2 and later recommended that a new M-3 Zone be created to accommodate the Appellant. Mr. Foster in addition to his recommendation expressed his opinion at the hearing that the Council's decision was not in the Municipality's best interests.

While the Board is fully aware of the fact that Mr. Foster is a well qualified and respected planner with many years practical planning experience the Board is unable to agree with Mr. Foster in this case.

Both planning reports approved by Mr. Foster emphasize the needs and concerns of the Appellant in its effort to relocate its operation to a more satisfactory site from its point of view. The report does not, in the Board's opinion, focus on the basic question of whether or not the proposed rezoning is in the best interests of the Municipality. Undeniably to rezone the subject site to either M-2 Zone or to create a new M-3 Zone and then rezone the Appellant's property to that Zone is in the best interests of the Appellant. Neither of the planning reports adequately deal with the legitimate concerns expressed by the area residents concerning traffic problems, the safety of children using a highway without the benefit of sidewalks, the visual effect of seeing sand and gravel stored in the open a relatively short distance from the highway and in sight of some residences on the opposite side of the road. Furthermore, the reports do not indicate any community or municipal need to have the Appellant's concrete plant established at this particular site.

There is no doubt that the relocation of the Appellant's plant to the subject site would result in some financial benefit to the municipality as the result of an increased assessment but this is not a valid reason for permitting the intrusion of uses which are not compatible to the existing uses in the vicinity.

The Board appreciates the difficulties of the Appellant in endeavouring to find a suitable site on which to relocate its operation. Ideally, the Appellant should relocate to an industrial park pre-zoned to permit M-2 uses. It would appear that Sydport is such a site but is not desirable from the Appellant's point of view because of the present lack of satisfactory road links between Sydport and the Sydney By-Pass. From the evidence of Mr. Foster it seems to be in the realm of possibility that a new access road will be constructed between Sydport and the Sydney By-Pass. If such a road were to be built then presumably the Appellant could locate there and avoid the problems associated with a so-called spot rezoning of land.

The Board although it disallows the appeal agrees with the contention of the Appellant that no objective evidence was adduced which would lead the Board to the conclusion that there would be a devaluation of residential properties in the vicinity of the subject site if the Appellant built a concrete plant there. However, the residents in the vicinity of the subject site are entitled some protection from the intrusion of incompatible uses which would result if the subject site were rezoned to either M-2 Zone or the proposed M-3 Zone.

Two additional matters need to be addressed and these are the allegations set forth in grounds 3 and 4 of the Appellant's Amended Notice of Appeal (Exhibit P-2) that the decision of the Council "will result in the Appellant's suffering undue hardship" and "that extraordinary and compelling circumstances are present which justify the allowance of this appeal".

Counsel for the Appellant in his post-hearing submission does not refer to either of these two grounds of appeal. Counsel for the Municipality in his post-hearing submission states that "...the Appellant has not established evidence of undue hardship or extraordinary and compelling circumstances which would cause the Board to allow the appeal".

The Board agrees with the contention of Counsel for the Municipality that there was in fact no evidence of undue hardship or of extraordinary and compelling circumstances which would give the Board cause to allow the appeal under the provisions of s.s. (7) of Section 63 of the Planning Act, Statutes of Nova Scotia, 1983, c. 9.

The Board therefore confirms the decision of the

Council pursuant to s.s. (4)(a) of Section 63 of the Planning Act, Statutes of Nova Scotia, 1983, c. 9.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 3rd day of October, A.D., 1984.

RHBlois

R.H. BLOIS, Q.C.

Chairman, Nova Scotia Municipal Board.

Scotney v. County of Kings

PLANNING--MUNICIPAL DEVELOPMENT PERMIT--CONSTRUCTION OF HOUSE--25 ACRE PARCEL WITH ONE EXISTING DWELLING ZONED AGRICULTURAL (A-1)--WHETHER INCONSISTENT WITH LAND-USE BY-LAW--MORE THAN ONE DWELLING PER LOT--CLASS 3 AGRICULTURAL SOIL--PLANNING ACT, Ss. 55, 56, 78--KINGS COUNTY LAND-USE BY-LAW, Ss. 3.9, 6.6.2-5--KINGS COUNTY MPS, S. 5.3

This is an appeal from a decision of the development officer of the Municipality of the County of Kings refusing to issue a development permit to the Appellant for the construction of a house on Cleveland Road near Berwick. The site in question is a 25 ac. parcel of land zoned Agricultural (A-1) and is included in the Kings County Municipal Development Strategy (MPS). The Appellant's own residential dwelling already exists on the subject property. The Appellant had already constructed a foundation for the proposed new dwelling. The evidence indicated the foundation was located on agricultural soil classified as Class 3.

HELD--The appeal is dismissed.

Since there is no agreement pursuant to ss. 55 or 56 of the Planning Act and no provincial land-use regulations in effect, s. 78(3) of the Planning Act requires that the Board, before ordering that the permit be granted, be satisfied that granting the permit is not inconsistent with the Municipality's Land-use By-law. The sole issue is whether the decision refusing the permit was inconsistent with the Land-use By-law. There is an onus on the Appellant to demonstrate the inconsistency and he has failed to discharge that onus. While the Appellant indicated it was "common practice" to commence construction and apply for a permit later, there is no evidence the Municipality condoned in any way this practice, which appears to have been the "common practice" of the Appellant and not the "common practice" of other builders. Having built about 20 homes, the Appellant knew or ought to have known about the necessity of having a development permit. It is clear the Municipality's Land-use By-law, s. 3.9, prohibits two dwellings on one lot "except where otherwise indicated in a particular zone". For an A-1 zone, there are special provisions contained in s. 6.6.2-5, but the Appellant does not meet any of them. Therefore to grant a permit would be inconsistent with the Land-use By-law and the development officer's decision to refuse the permit was justified. Even if there were no other building located on the subject property, the Appellant would not be entitled to a development permit for a non-farm use dwelling because the land on which the foundation is located and he proposes to build is Class 3 soil.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Statutes of Nova Scotia, 1983, c. 9;

- and -

IN THE MATTER OF: An Appeal by TERRY SCOTNEY from the decision of the Development Officer of the Municipality of the County of Kings made March 20, 1984, refusing to issue a development permit to permit the construction of a house.

BEFORE: R.H. BLOIS, Q.C., Chairman

COUNSEL: ERIC STURK, LL.B, for the Appellant;

PETER I. McINROY, LL.B, for the Municipality of the County of Kings.

DECISION

This is an appeal by TERRY SCOTNEY of R.R. No. 1, Berwick, Kings County, Nova Scotia, pursuant to s.s. (2) of Section 78 of the Planning Act, Statutes of Nova Scotia, 1983, c. 9 from a decision of the Development Officer of the Municipality of the County of Kings made on March 20, 1984, refusing to issue a development permit to the Appellant for the purpose of the proposed construction of a dwelling house on land situate on the west side of Cleveland Road near Berwick in the County of Kings.

The Appellant's original Notice of Appeal filed as Exhibit S-1, is in letter form and is dated April 4, 1984, and was received by the Board on April 9, 1984. At the request of the Board the Appellant filed a supplementary letter dated April 17, 1984, received by the Board on April 24, 1984, which sets out the date of the decision appealed from and the date (March 26, 1984) that the decision was received by the Appellant.

The Appeal was heard by the Board in the Council Chambers of the Municipality of the County of Kings at Kentville on June 7, 1984. Counsel were in agreement that the appeal was properly before the Board and the Board proceeded to hear the appeal on the merits.

The Appellant's Notice of Appeal states that the Appellant bases his appeal on the following facts:

> "1. Over a dozen houses have been built on the Cleveland Road in the past few years.
>
> 2. The lot in question is too small and unsuitable for agricultural purposes.
>
> 3. A new house is being constructed less than 100 feet from my lot and a building permit was recently issued for this home.
>
> 4. The lot is currently assessed and taxed as a building lot. I, therefore, feel that I should be allowed to build on this lot."

The Appellant made application for a development permit to construct a residence on a 40 acre parcel of land situate on the Cleveland Road at South Berwick by an application in writing dated December 10, 1983, a copy of which was filed as Exhibit S-17. The subject land is zoned Agricultural (A-1) Zone. The Municipality's Development Officer, Ridge Hiltz, by letter addressed to the Appellant and dated March 20, 1984, and filed as Exhibit S-16 rejected the application. It is from this rejection that the Appellant appeals to the Board.

The full text of the Development Officer's letter of March 20, 1984, is as follows:

> "I have had some trouble determining what is now located on the 40 acre parcel and wrote to you on this matter.
>
> You were in the office recently and confirmed that there was a single family dwelling on the 40 acre parcel and that this would be the second single family dwelling on the parcel of land.
>
> This being the case, in the Zoning Bylaw, Section 3.9 it states and I quote: 'No developer shall construct more than one (1) dwelling on a lot except where otherwise indicated in a particular zone.'
>
> The zoning of the area is A-1 (Agriculture). In this zone you are allowed only one single family dwelling per parcel of land pertaining to residential development.
>
> I am rejecting your application to construct a single family dwelling as it does not comply to the zoning requirements.
>
> You have the right to appeal this rejection under Chapter 9, Acts of 1983, an Act respecting Provincial and Municipal planning, Section 78(1) and (2) and you may appeal this refusal by serving notice of appeal on the Nova Scotia Municipal Board within fifteen days of the date of receipt of this letter."

The Municipality has in effect a Municipal Planning Strategy (Municipal Development Plan) consisting of two volumes, filed with the Board as Exhibits S-11 and S-12. The Municipality also has a Land-Use By-law (Zoning By-law) consisting of two volumes filed as Exhibits S-13 and S-14.

Counsel filed as Exhibit S-15 an "Agreed Statement of Facts" dated May 29, 1984, the operative part of which reads as follows:

> "(1) That Terry Scotney of R.R. No. 1, Berwick, Kings County, Nova Scotia is the registered agent and President of Marvel Metal and Glass Products

> Limited.
>
> (2) That the land upon which the construction project has taken place and which is the subject matter of the Building Permit and Development Permit which has been applied for, is owned by Terry and Anna Scotney and is land as described in Schedule "A" attached hereto and is located on the west side of the Cleveland Road, R.R. No. 1, Berwick, Kings County, Nova Scotia;
>
> (3) That the subject lands are located in an agricultural (A-1) Zone according to the zoning maps of the Municipality of the County of Kings;
>
> (4) That there is a residential dwelling already constructed on the lands in question;
>
> (6) That the project which is under construction is a single family residence."

Attached to Exhibit S-15 and marked Schedule "A" is a metes and bounds description of the subject lands situate on the west side of the Pelton Road (now known as Cleveland Road) and said to contain "30 acres, being the same more or less".

Section 78 of the Planning Act under which this appeal was brought reads as follows:

> "1) The refusal by a municipal development officer to issue a municipal development permit may be appealed by the applicant therefor.
>
> 2) A notice of appeal shall be served on the Board within fifteen days of the date that the written decision of the municipal development officer is served on the applicant.
>
> 3) The Board shall
>
> a) confirm the decision of the municipal development officer; or
>
> b) allow the appeal by ordering that the permit be granted, but no permit shall be granted that is inconsistent with the land-use by-law, an agreement entered into pursuant to Section 55 or 56, or a provincial land-use regulation."

Since there is no agreement entered into pursuant to Section 55 or 56 of the Planning Act and since there are no provincial land-use regulations in effect, the Board if it is to allow the appeal and order that the permit be granted must be satisfied that the granting of the permit is not inconsistent with the Municipality's Land-use By-law.

Evidence was given by the Appellant, Terrence Albert Scotney; Robert G. Elliott, the Director of Planning and Development for the Municipality of the County of Kings and by Ridge Hiltz, the Development Officer for the Municipality whose decision is the subject matter of this appeal.

The sole issue before the Board is whether the decision of the Development Officer in refusing to issue a development permit was or was not inconsistent with the Municipality's Land-Use By-law.

The Land-Use By-law sets forth the following permitted uses for the Agricultural (A-1) Zone:

"(a) Principal Uses

Existing farm dwellings
Existing non-farm dwellings
Existing mobile home parks
Agricultural uses (except intensive livestock operations)
Kennels
Greenhouses and nurseries
Forestry uses
Fishing uses
Any use in connection with the control of water and the generation of power
All structures used in connection with the transmitting, receiving, and relaying of television, radio, microwave and shortwave signals
Sewage treatment plants
Warehousing, agricultural services, supply or processing businesses in conjunction with a farm or forestry use

(b) Uses subject to Conditions

> Farm dwellings
> Intensive livestock operations
> Farm market outlets
> Farm tenement and bunkhouse accommodations
> Non-farm one and two family dwellings
> Residential day care centres
> Family care group homes
> Business offices
> Home occupations
> Seasonal cottages, cabins, lodges
> Community centres
> Public and private halls
> Fire stations
> Churches
> Cemeteries
> Camps sponsored by non-profit organizations
> Mobile home dwellings"

The A-1 Zone makes provision for special requirements and any permitted use in this zone must comply with the special requirements. Section 6.6.2-5 of the special requirements for this zone reads as follows:

> "Non-farm one and two family dwellings including mobile homes shall be permitted provided:
>
> a) Such uses were in existence at the effective date of this bylaw; or
>
> b) The dwelling is to be located on class 4, or 5, or 7 soil as indicated on the C.L.I. Agricultural Soil Capability Map of Kings County; or
>
> c) The dwelling is to be located on a parcel of land created prior to March 20, 1978; or
>
> d) The dwelling is to be located on an approved lot originally shown as fronting on a proposed new road in a tentative plan of subdivision approved prior to the above date and in which final approval has been granted for an average of ten per cent (10%) of the lots during each eighteen (18) month period since the date of tentative approval."

The Appellant testified that he is the owner of a parcel of land on the west side of the Cleveland Road originally containing about 30 acres out of which he has conveyed four lots leaving him approximately 25 acres. Located on the 25 acre parcel of land is a dwelling in which the Appellant resides and in addition there is a foundation for a dwelling house which he constructed in September, of 1982. He stated that he has three separate assessments relating to his property, one for the dwelling house and lot on which he resides, one for the foundation and lot of land and one for his remaining lands. He referred to Exhibit S-18 which is a rough sketch of a portion of Cleveland Road on which is attached four photos showing from south to north, firstly, the Appellant's dwelling house; secondly, a dwelling house built by the Appellant and sold to Syberen Halbersma; thirdly, the Appellant's foundation for which he seeks a development permit; and fourthly, a dwelling under construction owned by a Mr. McCamon. The McCamon house is approximately 50 feet north of the Appellant's north boundary on the west side of the Cleveland Road. Opposite the Scotney properties is land used for orchard purposes and north of the orchard land is land covered with trees.

The Appellant was asked by his counsel to point out on the soil classification map filed as Exhibit S-20 the location of his property. The witness pointed to a spot on the map about one-half inch from a red dot shown on the map in an area of land designated as "Class Three Soils". The red dot was subsequently identified by Mr. Elliott, Director of Planning, as the site of the foundation. The Appellant was not able to accurately locate his property on Exhibit S-20. He stated "I don't know" when asked to precisely locate his land on Exhibit S-20. He said he couldn't "pin-point it exactly". When asked by the Board to read the scale shown on the map he said he was unable to do so despite the fact that two scales, one in kilometers and one in miles, was clearly shown on the map. He was asked how far his property was from the point where the Lawrence Road joins the Cleveland Road. He was unable to answer the question. "As a guess" the witness thought his property was about a half mile from the Lawrence Road.

The Appellant stated that to the best of his knowledge his lands had never been farmed.

On cross-examination the Appellant was shown a copy of the letter dated March 20, 1984, from the Development Officer to the Appellant filed as Exhibit S-16 wherein the Development Officer had quoted Section 3.9 of Part 3 of the Zoning By-law (now Land-Use By-law) which applies to all zones and which reads as follows:

> "No developer shall construct more than one (1) dwelling on a lot except where otherwise indicated in a particular zone".

Also while under cross-examination the Appellant was asked if he had obtained a building permit when he constructed the foundation in September 1982 and he replied that he had not. He was then asked what he does for a living and he stated that he builds houses and had built approximately twenty houses. He indicated that it was "common practice" to commence construction of a house and apply for a permit later. In this case he stated he applied for a permit about a year after the start of construction.

The Appellant stated that he had purchased the 30-acre parcel of land from his uncle about 1977 at which time there were no buildings on the land. The land had a frontage on the Cleveland

Road of approximately 1,500 feet. In reply to a question from the Board the Appellant stated that he had not been aware of the provision in the Municipality's Zoning By-law (Land-Use By-law) that only one dwelling could be built on a lot of land.

After the completion of the Appellant's evidence, Counsel for the Appellant stated that that was all of the evidence on behalf of the Appellant. At this point Counsel for the Municipality moved that the appeal be dismissed on the basis that the evidence did not make out a prima facie case for the Appellant and that the evidence indicated there would be two dwellings on one lot of land if the permit was granted. Counsel for the Appellant then submitted that the Board could conditionally allow the appeal subject to the Appellant obtaining subdivision approval of his land into two parcels, one including the foundation and the other the Appellant's dwelling house. The Board denied the application for dismissal and Counsel for the Municipality then proceeded to call evidence.

Robert G. Elliott, the Director of Planning for the Municipality of the County of Kings gave evidence on behalf of the Municipality. Mr. Elliott is a qualified land use planner. He stated that the Municipal Planning Strategy (MPS) for the Municipality has in it a strong component designed for the protection of the best soils in Kings County, namely Class 2 and 3 soils. He pointed out that Kings County is basically an agricultural oriented area. He referred to Section 5.3 in Volume I of the Municipality's MPS which provides for an "agricultural district". Section 5.3 reads in part as follows:

> "In the designated Agricultural District

> all policies are tailored to a framework that will benefit agriculture, the most valuable primary resource in Kings County. The district is delineated as areas outside of the growth centres and hamlets in which a minimum of sixty per cent of the land is either in agricultural production or is classified by the Canada Land Inventory Survey as Class 2 or 3 agricultural soil capability".

It is also stated in Section 5.3 that:

> "Within the Agricultural District all farming activities are encouraged. Related and non-farm uses must not conflict with agricultural use of valuable farmland or restricting farm activities".

Also in Section 5.3 it is stated that:

> "New residential, institutional and recreational uses are not permitted to locate on class 2 or 3 agricultural soils. Residential subdivision activity is restricted to only one lot per landowner annually to deter speculative land development."

The MPS sets out specific policies with respect to the Agricultural District. The subject site lies within an area designated "Agricultural District" on map 52, the Municipality's Future Land-Use Map which forms part of the MPS.

Mr. Elliott referred to a map showing the "Soils of Kings Co., Nova Scotia - South Berwick 21H/02-52" filed with the Board as Exhibit S-20. He stated that the Council of the Municipality of the County of Kings had adopted an amendment to the Municipality's MDP which was approved by the Minister of Municipal Affairs on January 6, 1983, under which new soil capability maps for Kings County including the map filed as Exhibit S-20 became effective. These new maps as they are released became part of the MDP (MPS) and replaced the Canada Land Inventory maps previously in use. He stated that the subject property was located on class 3 soil as shown on the map filed as Exhibit S-20. He stated that he believed the subject foundation was located on Exhibit S-20 at the place where a red dot had been marked on the map although he had not personally marked the red dot location but it had been done by his staff. He said there had been some inaccuracies found in the soil map in effect in 1979 when the Municipality adopted the MDP but that surveys had been carried out and new soil maps were in use including Exhibit S-20. He pointed out non-farm dwellings were not permitted on land designated as class 2 or 3 soil. He pointed out some exceptions to this general prohibition. One exception is for lots created prior to March 20, 1978 which was the date when the Municipality made public its intention to adopt a MDP.

Mr. Elliott indicated that a landowner is entitled to subdivide and convey one lot per year even on class 2 or 3 soil but the lot cannot be used for purposes of a non-farm building.

The Board questioned Mr. Elliott about the appeal of Rita Lloyd decided by the Provincial Planning Appeal Board in February of 1981. The decision in that case is reported in Volume 11 page 1515 of the Provincial Planning Appeal Board Reports. In that case the Council refused to rezone lands in Kings County from agriculture to Forestry Zone to accommodate the Appellant's daughter who wished to build a house on a lot which the Appellant was prepared to have subdivided and conveyed to her daughter. The proposed lot was adjacent to lands on the Prospect Road on which the Appellant lived and these lands were in an area classified as Class 3 soil. The Prospect Road joins the Cleveland Road about 3/4 of a mile from the subject site. The PPA Board disallowed the appeal on the basis that to rezone the property in question would be inconsistent with the intent of the MDP. In the decision relating to the Lloyd case the Board noted that:

> "Mr. Elliott (the Director of Planning, submitted in his evidence that personal examination of the site would lead one to believe that the Canada Land Inventory Survey soil capability study may not have been entirely accurate, particularly in the area of the land in question. The Board is pleased that the Municipality is in the process of re-studying the soil capability in the County and giving first priority to the area in which the lands in question are situate. The Board urges the Council to complete and act upon the results of the re-study as soon as possible."

As a sequel to the Lloyd case, Mr. Elliott advised the Board that the soil map in use at the time of the Lloyd case was inaccurate and the Lloyd lands which were the subject matter of the appeal to the PPA Board are now shown on the new soils map as a gravel pit and not as Class 3 soil.

Mr. Elliott stated that the Development Officer is the person in the Municipality who interprets the soil classification map after receiving an application for a development permit. In some instances the Development Officer does a site inspection and then he examines the soils map to determine the soil class for the property in question. In some instances it is a "judgment call" by the Development Officer in a borderline case where it is difficult to determine precisely where the property is located on the soils map.

Mr. Elliott admitted that as a result of the present MPS policies there are pockets of land designated as class 2 or 3 soils but which are unsuitable for farm purposes and which cannot be built upon.

The final witness to testify was the Development Officer, Ridge Hiltz who has held his position for about three years. He stated that in 1982 it had been brought to his attention that a dwelling house foundation had been constructed on the Appellant's land on the Cleveland Road without a permit. This resulted in the Municipal Building Inspector placing a "Stop Work" order on the property.

Upon reviewing the Appellant's application for a development permit (S-17) Mr. Hiltz decided that it did not meet the Municipality's Zoning By-law requirements on the basis that there would be two dwellings on one large parcel of land, that is, the dwelling in which the Appellant resides and the foundation of a dwelling on which the Appellant wished to construct a house. He identified Exhibit S-16 as a copy of his letter to the Appellant rejecting the application. Mr. Hiltz stated that even if the foundation for a dwelling had not been constructed he would not approve a subdivision of the Appellant's lands into two parcels, one for a lot on which it was proposed to construct a non-farm use residence and the other being the remainder of the Appellant's lands on which his own house is located. He would, however, approve a subdivision into two lots if an intention was indicated that a farm dwelling was to be constructed on the subdivided lot.

Mr. Hiltz stated that he had personally carried out measurements on the Cleveland Road which determined that the foundation in question was on class 3 soil. His method of measurement was unique in that he measured the distance from the Prospect Road to the foundation along the Cleveland Road by means of the odometer in his automobile. He indicated that this was a distance of 3,600 feet. When asked why he didn't use a tape measure he stated that from his experience a tape measure for that distance would not have been any more accurate than the odometer. He stated he had done some survey work although he is not a surveyor. He was asked to locate the foundation on the soil map S-20. He did this after scaling the distance of 3,600 feet from the Prospect Road. He then marked the location in ink on S-20. The point he marked in ink is slightly north of the red dot previously marked on the map as the location of the subject site. He calculated that the most northerly boundary of the class 3 soil is 3,831 feet from the Prospect Road. These measurements satisfied Mr. Hiltz that the subject site is within the area designated as class 3 soil on map S-20.

Mr. Hiltz stated that the only possible way for the Appellant to obtain subdivision approval of a lot including the foundation would be to satisfy him that the land would be used for farm purposes or if the Appellant entered into an agreement pursuant to Section 55 or 56 of the Planning Act.

Finally Mr. Hiltz testified that he had issued a development permit respecting the McCamon house under construction located on the Cleveland Road north of the Appellant's foundation. Mr. Hiltz stated that the McCamon house is outside the class 3 soil area and he had verified this by measurements made prior to issuing a permit for this residence.

It is the opinion of the Board that there is an onus on the Appellant to demonstrate to the Board that the decision of the Development Officer in refusing to issue the municipal development permit applied for was inconsistent with the Municipality's Land-use

By-law. It is also the Board's opinion that the Appellant has not discharged that onus.

The evidence clearly and unequivocally indicates that at the time of the Appellant's application for the development permit and at all material times since, the Appellant and his wife Anna Scotney were the owners of a single parcel of land containing approximately 25 acres, being the remaining portion of a 30 acre parcel acquired from the Appellant's uncle in 1977.

It is also perfectly clear from the evidence that in September of 1982 the Appellant without a building or development permit commenced the construction of a dwelling house by erecting a cement foundation on a portion of the 25 acre parcel on which the dwelling in which the dwelling in which he resides is located. Although he admitted not having applied for a permit at or before the time of construction the Appellant testified that it was "common practice" to commence construction and apply for a permit at a later date. There was no evidence before the Board that the Municipality condoned in any way this practice which appears to have been the "common practice" of the Appellant and not the "common practice" of other builders.

The Appellant is not a novice in the matter of house building, having built about 20 homes, and knew or ought to have known about the necessity of having a Development Permit.

It is also perfectly clear that the Municipality's Land-Use Byplaw prohibits two dwellings on one lot. Section 3.9 of Part 3 - General Provisions for All Zones in Vol. 1 of the Land-Use By-law states that:

"No developer shall construct more than

> one (1) dwelling on a lot except where
> otherwise indicated in a particular zone".

The subject property is located in an Agricultural (A-1) Zone and under the provisions of Section 6.6.2-5 relating to "Special Requirements" in an A-1 Zone, non-farm one and two family dwellings including mobile homes shall be permitted provided such uses were in existence when the Land-Use By-law came into effect, or the dwelling is located on Class 4, 5 or 7 soil, or the dwelling is on a parcel of land created prior to March 20, 1978 or the dwelling is to be located on an approved lot in a tentative plan of subdivision approved prior to March 20, 1978. The full text of Section 6.6.2-5 is set forth on page 6 of this decision.

The Appellant's property does not meet any of the special requirements of Section 6.6.2-5 and therefore the Development Officer was justified in refusing the Appellant's application for a development permit on the basis that if he granted a permit it would be inconsistent with the Municipality's Land-Use By-law. The Board by virtue of s.s. 3(b) of Section 78 of the Planning Act is prohibited from allowing an appeal by ordering that a permit be granted where the permit would be inconsistent with the Land-Use By-law.

The evidence satisfies the Board that the dwelling foundation on the Appellant's land is located on lands designated as Class 3 soil on the soil classification map of Kings County filed as Exhibit S-20 and because of this fact the Appellant would not be entitled to a development permit for a non-farm use dwelling even if there was no other building located on his land. Although neither the Appellant nor the Development Officer was able to precisely locate the foundation in question on Map S-20 the Board accepts the evidence of the Development Officer that the foundation is in fact located on class 3 soil. The Board can appreciate the concern of the Appellant that the Development Officer issued a development permit for the construction of a non-farm use dwelling on land owned by a Mr. McCamon adjacent to the Appellant's land to the north and within a few hundred feet of the foundation of the Appellant's land. However the Development Officer has testified that the McCamon dwelling under construction is located outside of the Class 3 soil area. It seems to the Board that in cases where the proposed construction of a dwelling is close to the division line between land designated as class 2 or 3 soil and land of poorer quality that a survey would be appropriate to accurately determine in which soil class the land is situate. Whether the McCamon foundation is in fact located inside or outside the class 3 soil area is not in issue but it would appear from the evidence adduced that the McCamon foundation is close to the division line between the class 3 soil area and the area to the north designated as class 4 and 5.

For the reasons stated the Board confirms the decision of the Municipal Development Officer in rejecting the Appellant's application for a permit to construct a single family dwelling.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 22nd day of October, A.D., 1984.

RHBlois

R.H. BLOIS

MEMBER, NOVA SCOTIA MUNICIPAL
BOARD.

Nash v. District of Chester

PLANNING--ZONING--AMENDMENT--REFUSAL TO REZONE FROM R-1 TO SCC--REFUSAL TO ADD TO PERMITTED USES IN SCC ZONE TOURIST COTTAGES ASSOCIATED WITH INNS--WHETHER NOTICE OF APPEAL INVALID--ALLEGATION OF BIAS--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--PLANNING ACT, Ss. 63(1),(3),(4),(5)--DISTRICT OF CHESTER LAND-USE BY-LAW, Ss. 6.5.1, 6.5.3, 15.70--DISTRICT OF CHESTER MPS, Policies 4.6, 4.7

This is an appeal from a decision of the Council of the Municipality of the District of Chester refusing to amend the Municipality's Land-Use By-law in two ways: (1) to rezone the western portion of the Appellant's 1.6 ac. property from Residential Single and Two Family (R-1) to Special Commercial "C" (SCC), and (2) to add as a permitted use in as SCC Zone "tourist cottages associated with inns". The subject property lies on the north side of North Street (Hwy. 3) in Chester, across from a Petro Canada Service Station, and is trapezoidal in shape with 239.96 ft. road frontage, 380 ft. depth and a 9.04 ft. rear boundary abutting property owned by the C.N.R. It is bounded by three residential properties on the east and a brook on the west, beyond which is a residential property. The Appellant's house is set well back from the road and five of its eight rooms are used in a commercial operation as the Stoneybrook Guest House. The SCC zone covers only the area surrounding the house (33,000 sq. ft. with 115 ft.road frontage), while the balance of the property is zoned R-1. The Appellant wishes to add three cottages to the existing five units available in the house for tourist use. The area is included in a Municipal Planning Strategy (MPS).

HELD--The appeal is dismissed. The decision of Council is confirmed.

The only issue before the Board is whether the decision of Council reasonably carries out the intent of the MPS. The omission of that citation in the grounds contained in a Notice of Appeal is not fatal to the Appellant's right to a hearing. It is clear from the Notice that the Appellant disagrees with the decision Council made. If the Appellant were to state merely that Council's decision does not "reasonably carry out the intent of the Municipal Planning Strategy", the Municipality would not have learned much about the issues it must meet in defending Council's decision. Ideally the Notice of Appeal should cite the ground set out in s. 63(3) of the Planning Act and state in what respects Council's decision does not conform to the MPS, quoting specific policies of the MPS if possible. Of the three issues cited as grounds of appeal, two were disposed of during the hearing by concessions or acknowledgements made by the Appellant during cross-examination. The Appellant's contention that Council was biased and that he was unjustly treated is not a matter which this Board has a mandate to consider; other legal remedies exist. On the only issue which the Board must consider, the onus is on the Appellant to prove that Council's decision did not reasonably carry out the intent of the MPS. The Appellant has not successfully discharged that responsibility. There has been a long standing difference of opinion about the optimum land use for the north side of North St. and the subject property. The policies of the MPS now in effect represent a compromise between those who wish to retain the residential character where it exists and the Appellant, who wishes to ensure the maximum commercial use of his property. Council has correctly interpreted Policy 4.6 which precludes any change in the boundaries of commercial areas through rezoning. An expansion of Central Commercial Areas and Highway Commercial Areas is allowed only through a development agreement. The decision of Council reasonably carries out the intent of the MPS.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, S.N.S., 1983, as amended;

- and -

IN THE MATTER OF: An Appeal by MICHAEL P. NASH, from a decision of the Council of the Municipality of the District of Chester made April 30, 1984, which refused (1) to amend Section 6.5.1 of the Municipality's Land-Use By-Law to add "tourist cottages as associated with inns" as a permitted use in the Special Commercial "C" (SCC) zone, and (2) to rezone the western portion of the Appellant's 1.6 acre property located on the north side of North Street in Chester from Residential Single and Two Family (R-1) Zone to Special Commercial "C" (SCC) Zone to enable 3 tourist cottages to be added to the Stoneybrook Guest House.

BEFORE: ELIZABETH LAWRENCE - Vice-Chairman

COUNSEL: MICHAEL P. NASH, appearing on his own behalf without Counsel.

DEREK M. WELLS, LL.B., for the Municipality of the District of Chester

DECISION

A hearing was held June 21, 1984, in the Council Chambers of the Municipality of the District of Chester, King Street, Chester, on an appeal by Michael P. Nash (Exhibit N-1) dated May 1, 1984 and received by the Board May 4, 1984 from a decision of the Council of the Municipality of the District of Chester made April 30, 1984. The decision appealed, pursuant to Section 63(1) of the Planning Act, was the refusal by Council to approve the Appellant's application to amend the Municipality's Land-use By-law in two ways: (1) to rezone the western portion of the Appellant's 1.6 acre property from Residential Single and Two Family (R-1) Zone to Special Commercial "C" (SCC) Zone, and further, (2) to amend Section 6.5.1 by adding as a permitted use in the Special Commercial "C" (SCC) Zone "tourist cottages associated with inns".

An earlier appeal dated April 16, 1984, and received by the Board April 18, 1984 was filed by the Appellant from a refusal of the Appellant's application, as outlined above, by the Planning Advisory Committee (PAC) of the Municipality of the District of Chester ("The Municipality") on April 10, 1984. There being no appeal from a decision of a Planning Advisory Committee allowed by the Planning Act, the Appellant subsequently withdrew this appeal by letter dated April 24, 1984, received by the Board April 26, 1984.

The Notice of Appeal (Exhibit N-1) does not state valid grounds of appeal, but does indicate the Appellant's objection to the present zoning of the subject property allegedly established without the knowledge of the Appellant, to the division of the property into two different zones, and to an alleged bias on the part of the Council.

The primary and fundamental issue before the Board in this appeal as stated by Counsel for the Municipality, is clearly set out in Section 63(3) of the Planning Act as follows:

> " The Board shall determine whether the decision of the Council reasonably carries out the intent of the municipal planning strategy."

and further in Section 63(4)

> " The Board shall not allow the appeal unless the Board determines that the decision of Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy."

The subject property lies on the north side of North Street (Highway 3) in Chester, across from the Petro Canada Service Station. It has a total area of 1.63 acres, with a 239.96 foot frontage on North Street and a depth of 380 feet to a 9.04 foot rear boundary which abuts property owned by the C.N.R. The property is trapezoidal in shape and is bounded on the west by Houghton's Brook, beyond which is a residential property, and on the east by three residential properties. On one of the three residential properties to the east of the subject there is a greenhouse formerly used commercially. The property has its own well and is serviced by an eight inch gravity sewer line.

The Appellant's house is set well back from the road. Five of the eight rooms are used in the commercial Stoneybrook Guest House operation. The Special Commercial "C" (SCC) Zone on the property covers only the area surrounding the house, which is an area of 33,000 square feet, with a total road frontage of 115 feet. The balance of the property is zoned Residential (R-1).

The Appellant gave evidence on his own behalf. Counsel for the Municipality called two witnesses. Nine other persons appeared at the hearing and gave evidence.

Mr. Nash, the Appellant, stated that he had bought the subject property in 1968 and had operated a Snap-on Tool Franchise, a carpet cleaning business, and a patio block manufacturing operation on the subject property. Mr. Nash filed a number of letters from the Department of Trade and Industry, the Nova Scotia Water Resources Commission and the Board of Health, (Exhibit N-5), all dated 1969, concerning approvals needed for the construction of a proposed 8-unit motel on the subject property. The property at that time was not restrictively zoned but Mr. Nash did not proceed with the motel project. On March 25, 1976, a Municipal Development Plan (MDP) came into effect for Chester Village. On the same date a Zoning By-law came into effect which zoned the Appellant's property Residential Single and Two Family (R-1). The Appellant stated that in 1981 he was allowed to operate a guest house using two rooms of his existing house. The subject property was still zoned R-1 at that time.

Mr. Nash was an appointed member of the Municipality's PAC from May, 1981 to May 1983 - a period which covered the Five Year Plan Review, which led ultimately to Council's adoption of a Revised Plan and Zoning By-law in February 1983. He outlined various events which led to the current zoning on the subject property.

Throughout the MDP review process, the Appellant maintained that his preference was to have the subject property zoned commercial. The Appellant filed a copy of a letter (Exhibit N-6) dated February 23, 1982, written by him to the Chairman of the PAC, which summarizes his position on the zoning of his property. The letter states:

> " I am writing you this letter in response to the discussion we had at our previous meeting on February 17, 1982, also a telephone conversation with Mr. Peter Oickle Feb 22 1982, concerning a change in the future planning and zoning map (2) of the area west of King St. on the north side to the Village Building Supplies, or spot zone our property.
>
> As you know this small section is situated in a high industrial and commercial area. The north side of the street consist of approx. eight homes, and facing these homes on the south side of the street are the following businesses, (1) La Have Auto Parts, (2) N.S. Power Commission, (3) Petro Canada Bulk Station, (4) Petro Canada Service Station and Garage, (5) Hawbolt Industries Ltd. On the north side just in back of these homes is the C.N. Railway Track, and on the west side of this same section we have the Village Bldg. Supplies Ltd. On the east side abutting our property we have another business consisting of a Green House, from which plants and flowers are sold. Therefore, I would like to suggest, based on the information above, that this area should be re-zoned to highway commercial from R-1 development agreement, or spot zone our property which is 1.6 acres of land to commercial or special commercial. I ask this because our seasonal overnight Tourist Home will then be on an equal status with the other Tourist Homes in Chester.
>
> ....
>
> In all due respect to the L.P.C. office and the Planning Advisory Committee, I ask for your full consideration of a re-zoning change of this area in question, or spot zoning of our property."

According to a chronological account of planning events related to the subject property (Exhibit N-7) prepared by Counsel for the Municipality from correspondence on file and Minutes of Council and Committees, the details of which were not contested by the Appellant, the proposed zoning designation of the subject property changed from the first draft of the revised MDP and zoning by-law to the second draft. The first draft revision prepared January 29, 1982, proposed a residential zoning for the Appellant's property but included it in the Highway 3 Development Agreement Area where commercial uses might be permitted by Development Agreement. The second draft, prepared March 4, 1982, proposed a commercial designation and a Special Commercial Zoning for the subject property, with adjacent properties on either side remaining residentially zoned in a Development Agreement area. The third draft of the revised plan and zoning by-law prepared July 22, 1982, showed no change from the second draft with regard to the Nash property.

Between the third draft of July 1982 and the adoption by Council of the fourth and final draft of the revised zoning by-law on February 8, 1983, a series of events took place which led to changes to the zoning designation and/or other restrictions on the subject property. These changes were chronicled by the Appellant in direct testimony and in cross-examination.

Mr. Nash first proposed the expansion of his guest house by the addition of cottages in August of 1982. In September, 1982, a group calling itself the North Street Protection Society objected to the proposed extension of the commercial use of the Nash property and raised the issue of conflict of interest on the part of Mr. Nash as a member of the PAC. The North Street Protection Society continued to press for a residential designation and zoning for the subject property and surrounding area. On January 19, 1983, Council and PAC members sitting as the Planning Committee voted to remove the Highway 3 Development Agreement Area designation from the properties adjacent to the Nash property, and on January 31, 1983, Council tightened up the wording in the by-law relating to "Inns" by specifying that there should be one inn per lot in an existing dwelling only and specifying that an inn shall have no more than eight rooms. On February 8, 1983, Council "fixed" the boundaries of Special Commercial areas. The Appellant was present at this last Council meeting and spoke to Council, requesting reconsideration of the changes to the zoning by-law which affected his property. Council did not rescind these previous decisions, and adopted the fourth draft of the revised plan and zoning by-law, subsequently approved by the Minister November 1, 1983.

The Appellant stated that he objects very strongly to his property being divided into two zoning designations and felt that since "Chester Council" had once approved an 8-unit motel for the property, it was now inconsistent of Council to refuse the amendments to the Land-use By-law which would make it possible to add three cottages to the existing five units available in the house for tourist use. Mr. Nash contended that his long standing commercial use of the subject property together with the other existing commercial uses in the area made the restrictions on the commercial use of his property unfair. The Appellant acknowledged in cross-examination that he was aware of the zoning "split" of his property in 1982 but that it was "against his wishes."

William Plaskett, who has been employed with the

Lunenburg County District Planning Commission for nine years and is currently assigned to the position of Planner, gave evidence for the Municipality. Mr. Plaskett assisted in the drafting of the revised Municipal Planning Strategy and Land-use By-law for Chester Village during 1982-83 and prepared the report to Council dated April 9, 1984, on the application by the Appellant which is the subject of this appeal (part of Exhibit N-7).

Mr. Plaskett outlined the existing land uses in the area of the subject property, pointing out that the nearest commercial use of the same side of North Street was Village Building Supplies, 500 feet to the west of the Nash property, with four residential properties in between. The properties immediately adjacent to the Nash property are all residential. On the other side of North Street however, Mr. Plaskett stated that the existing land use is almost entirely non-residential in a mix of industrial and highway commercial uses. Mr. Plaskett considered that the Special Commercial zoning of the Nash property as it currently exists was a "compromise solution" to the adjacent residents' interests and the Appellant's commercial ambitions which was arrived at during the course of the Five Year Review of the Municipal Planning Strategy and Land-use By-law.

The Land-use By-law requirements which are relevant to the subject property according to Mr. Plaskett are the following:

> Part 6.5.3 " In a Special Commercial (SCC) Zone, Inns shall be located in existing dwellings only and there shall be no more than one (1) Inn per lot".

Definition 15.70 " "Inn" means a building where the resident innkeeper provides accommodation, with or without meals, to the travelling public for financial profit and which does not include a hotel, motel, meeting room, restaurant or entertainment facilities and which contains no more than eight (8) rental units."

The "Permitted uses" in Special Commercial "C" (SCC) Zone of the by-law are "Inns" and "All uses permitted in the Residential (R-1) Zone."

The Plan policies which are relevant to the subject property are as follows:

Policy 4.7 " It shall be the policy of Council to designate existing commercial uses that are isolated in residential neighbourhoods as Special Commercial Areas, as shown on Map 2, Future Land Use Map".

Policy 4.6 " The boundaries of the Commercial Areas as shown on Map 2, Future Land Use Map, shall be regarged as fixed boundaries and shall not be changed through rezoning, Policy 9.13 notwithstanding. Where a commercial use in a Central Commercial Area or Highway Commercial Area wishes to enlarge and expand beyond the Commercial Zone boundary into a residential zone, Council may enter into a Development Agreement, subject to Sections 33 and 34 of the Planning Act, provided that:

a) an existing or similar use is to be enlarged and that the enlargement is to be located on a lot which is to be added to the lot on which the existing use is located;

b) the proposed enlargement cannot be accommodated within the designated commercial area;

> c) the proposed use would otherwise be permitted within the designated commercial area;
>
> d) the use shall not have a negative influence upon abutting properties as a result of the emission of light, noise, odour, radiation or dust."

Mr. Plaskett pointed out that the effect of Policy 4.6 was to allow controlled expansion of Central or Highway Commercial uses into adjacent residential areas by Development Agreement but to allow no expansion of Special Commercial uses. The Nash property he stated is one of four in Chester which are designated Special Commercial. Similarly to the subject property, Mr. Plaskett pointed out that in the other properties zoned Special Commercial, the zone boundary did not conform to the property boundary. Only the commercial facility on each property was included in the Special Commercial Zone, with the balance of the property being zoned residential. Mr. Plaskett was of the opinion that Policy 4.6 of the Municipal Planning Strategy precluded Council from approving the rezoning portion of the Appellant's application. The "tourist cottages" portion of the application would similarly involve amendments to the MPS and/or Land-use By-law, in his opinion, and therefore approval of that component of the application would not conform to the MPS.

Councillor Jerome Morgan, who has represented District 3 on the Municipal Council since October 1982 and is a member of the PAC and The District Planning Commission, gave evidence on his involvement with the Five Year Review of the MDP and Zoning By-law and the decisions of PAC and Council on the

Appellant's application to amend the Land-use By-law. Councillor Morgan, who represents the district in which the subject property is located, stated that he was aware during the course of his involvement in the Five Year Review of the concerns of all sides about the Nash property, and he believed that PAC and Council considered all issues and all aspects of the concerns expressed before removing the special agreement status from the properties adjacent to the subject property and limiting the Special Commercial Zone to the area around the Nash home. The possible future year-round use of the proposed cottages was a concern of Mr. Morgan's.

Three residents of North Street, who live immediately adjacent to the subject property - Basil and Mary Brownless and Sharon Monro - gave evidence on their concerns about an expansion of the commercial use of the Nash property.

Mr. & Mrs. Brownless have lived immediately adjacent to the east of the Nash property for four years. Mr. Brownless filed a petition (Exhibit N-14) on behalf of the North Street Protection Society, dated June 21, 1984 and signed by 20 persons stated to be "Members of the North Street Protection Society - all property owners in close proximity to the Nashs' Guest house." In general, the preamble to the petition expresses anxiety about further commercial expansion of the Nash Guest House and its incompatability with the primarily residential character of the north side of North Street.

In cross-examination it was acknowledged that the North Street Protection Society had no officers, no dues and was not a society registered under the Societies Act.

Sharon Munro, who lives immediately adjacent to the west of the subject property across from Houghton's Brook, stated that the current use of the Nash property gave her no difficulty and that she and her father (who was then alive) had supported the 25% commercial use of the Nash property which commenced in 1981. She stated however, that she was opposed to the complete commercial zoning of the Nash property and to the expansion of the operation by the construction of three cottages on the side of the property abutting her own. In her written objections to the Nash application, filed as Exhibit N-15, Ms. Munro stated that "The noise which would no doubt result from the proposed cabins would distract from the peaceful quality of my property."

Four persons operating businesses in Chester spoke in favour of the Nash application and one against.

Counsel for the Municipality, in his post-hearing brief, refers to the three grounds of appeal cited by the Appellant which he summarized as follows:

> " 1) that their property was split into two zones without their knowledge or consultation,
>
> 2) that their fixed boundary is the whole surveyed lot;
>
> 3) that Council was biased."

Counsel for the Municipality contends that the Appellant's Notice of Appeal is defective because none of the grounds of appeal are matters to be considered by the Board as set out in the Planning Act and suggests that the Board "has to consider whether or not the Appellants have to cite in their Notice of Appeal that Council's decision does not carry out the intent of the Municipal Planning Strategy."

The Board agrees with Counsel for the Municipality that the only issue before the Board as set out in Section 63(3) of the Planning Act, is whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy, but disagrees that the omission of that citation in the grounds contained in a Notice of Appeal is fatal to an Appellant's right to a hearing. It is clear from the Notice of Appeal in this case that the Appellant disagrees with the decision Council made and whether or not the Appellant precisely quotes the relevant section of the Act in his grounds of appeal, that is nevertheless the only issue for the Board to consider. If the Appellant were to state merely that the grounds were that the decision of Council does not "reasonably carry out the intent of the Municipal Planning Strategy", the Municipality would not have learned much about the issues which it must meet and answer in defending the decision of Council.

Ideally, in an appeal pursuant to Section 63 of the Act, an Appellant should cite the ground set out in Section 63(3) (that the decision of Council does not reasonably carry out the intent of the Municipal Planning Strategy) and further cite in what *respects* the Council's decision does not conform to the Municipal Planning Strategy, quoting specific policies of the MPS if possible. The Board however, is prepared to accept Notices of Appeal which are less than ideal in this respect, particularly if the Appellant is not represented by Counsel.

In the opinion of the Board, two of the three issues cited as grounds for appeal by the Appellant were disposed of during the hearing. Mr. Nash conceded during cross-examination that he had been aware of the proposed split zoning of his property since 1982 and that he had had ample opportunity to make his views known in opposition to the proposed split zoning of the subject property which Council ultimately approved in February, 1983. The Appellant also acknowledged during cross-examination that Policy 4.6 of the MPS referred to the fixed boundaries of commercial areas which do not necessarily correlate with fixed property boundaries.

The Appellant's contention that Council was biased and that he was unjustly treated is not a matter which this Board has a mandate to consider. Other legal remedies exist for this allegation of unfairness.

There is only one issue which the Board must consider in this appeal: whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy. In coming to a conclusion on that sole issue, the Board is constrained by Section 63(5) of the Act which states:

> " The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

The onus is on the Appellant to prove that Council's decision did not reasonably carry out the intent of the MPS.

Having visited the site and considered the evidence presented at the hearing and the briefs submitted by the parties, the Board concludes that the Appellant has not successfully discharged that responsibility.

It was abundantly clear to the Board from the evidence at the hearing that there has been a long-standing difference of opinion between the Appellant and the majority of the residents of North Street about the optimum land use for the north side of North Street and the subject property. From the evidence it seems that the policies of the MPS now in effect represent a compromise between the interests of residential property owners on North Street who wish to retain its residential character where that exists and the interests of the Appellant who wished to ensure the maximum commercial use of his property. The Board accepts the evidence that the Appellant was an active participant in the review process which resulted in the current MPS but was nevertheless unable to pursuade the Council to allow his property to be zoned entirely commercial.

Council's decision to refuse the Appellant's application to rezone the western portion of his property from R-1 to Special

Commercial "C" (SCC) Zone correctly interpreted Policy 4.6 which precludes any change in the boundaries of commercial areas through rezoning and allows expansion of Central Commercial Areas and Highway Commercial Areas only through Development Agreement.

The planning staff of the Lunenburg County District Planning Commission chose to regard the two proposed amendments as one integrated application. However, the rezoning of the western part of the Applicant's property to Special Commercial "C" (SCC) Zone is a prerequisite to the further amendment to the Land-use By-law which would be necessary if tourist cottages were to be built there. The approval of the second component of the Appellant's application - the amendment to the Land-use By-law to add "tourist cottages as associated with inns" as a permitted use in the Special Commercial "C" (SCC) Zone - would be of no advantage to the Appellant if Council were precluded by Policies of the MPS from rezoning the balance of the subject property from Residential to Special Commercial "C" (SCC) Zone. From the evidence heard by the Board, it appears that other amendments in addition to this proposed new permitted use would be needed to the Land-use By-law to ensure consistency and clarity.

The Board concludes from the written and oral evidence that Council during the Five Year Review of the Planning Strategy carefully examined various policy options available for the subject property and surrounding area and considered the opinions of all interested parties before approving the current MPS.

The Board further concludes that the decision of Council reasonably carries out the intent of the Municipal Planning Strategy in its refusal to amend Section 6.5.1 of the Municipality's Land-use By-law to add "tourist cottages as associated with inns "as a permitted use in the Special Commercial "C" (SCC) Zone and in refusing to rezone the western portion of the Appellant's property from R-1 Zone to Special Commercial "C" (SCC) Zone to enable three tourist cottages to be added to the Stoneybrook Guest House. Pursuant to Section 63(4)(a) of the Planning Act the Board therefore confirms the decision of Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia this 30th day of November, A.D., 1984.

E A Lawrence

ELIZABETH LAWRENCE

Re Wilson's Shopping Centre Limited

PLANNING--SHOPPING CENTRE DEVELOPMENT--WHETHER PERMIT REQUIRED--WHETHER A CASE SHOULD BE STATED TO THE APPEAL DIVISION--DEFINITION OF SHOPPING CENTRE--DEFINITION OF DEVELOPMENT--MUNICIPAL BOARD ACT, S. 37(1)--SHOPPING CENTRE DEVELOPMENT ACT, Ss. 2(c),(e), 3(1), 5(1), 10(1), 11(1), 12(1)

This is an application requesting the Municipal Board to state a case for the opinion of the Appeal Division of the Supreme Court of Nova Scotia on whether the Applicant requires a permit from the Board under the Shopping Centre Development Act. The Applicant proposes to enlarge an existing building supplies building by 30,750 sq. ft., of which 27,000 sq. ft. would be retail space for the sale of hardware and 3,750 sq. ft. would be mezzanine space for office and related uses. The Board was of the view that further facts were required and with the consent of the Applicant held a public hearing to determine relevant facts and from an analysis of these facts determine whether to state a case. After the public hearing the Applicant requested the Board to determine that the development proposed was not a shopping centre within the meaning of the Act.

HELD - The Board will not state a case as originally requested because the Applicant does not require a permit.

Section 2(e) of the Shopping Centre Development Act states that "shopping centre" means a development used primarily for the purposes of retail trade and resulting or intended to result in a total of fifty thousand sq. ft. or more of (i) new retail floor space, or (ii) new and existing retail floor space where the new retail floor space exceeds ten thousand sq. ft., including common areas and related office and warehouse space but excluding parking areas. No Municipal Development Strategy is in place for the area of the proposed development. The development proposed by the Applicant consists of the expansion of an existing building so as to contain 35,700 sq. ft. of new and existing retail floor space. This removes it from the definition of "shopping centre", which requires at least 50,000 sq. ft. Note that in ariving at this conclusion the floor area of two storage buildings is excluded since storage area is not "retail floor space". Furthermore, under the definition of "development", the words "construction or expansion" relate to "any building or structure", i.e., to any one building. Adjacent buildings owned by the Applicant and used as a Foodland and Drygoods store, a plumbing and service building and a women's fashion shop are not to be included. It is noted that the Foodland and Drygoods store, although owned by the Applicant, is separately managed, has its own separate parking area, and its own separate water supply. It is also on its own separate parcel of land and is separated from the other by a Provincial Highway. And the plumbing and service building and women's fashion shop are also physically separated from the Foodland and Drygoods store by the Ferry Road. Therefore, no permit is required because the proposed development is not a shopping centre.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Municipal Board Act, Statutes of Nova Scotia, 1981, c.9;

- and -

IN THE MATTER OF: The Shopping Centre Development Act, Statutes of Nova Scotia 1978 - 1979, c.74;

- and -

IN THE MATTER OF: An application by Wilson's Shopping Centre Limited requesting the Board to state a case in writing for the opinion of the Appeal Division of the Supreme Court of Nova Scotia.

BEFORE:	R.H. BLOIS, Q.C., Chairman ELIZABETH LAWRENCE, Vice-Chairman DARRYL W. WILSON, C.A., LL.B., Member
COUNSEL:	IRVING C. PINK, Q.C. GREGORY M. WARNER, LL.B. ROBERT G. GRANT, LL.B., for the Applicant
	CLYDE A. PAUL, LL.B. for the Board.

DECISION

This is an application by Wilson's Shopping Centre Limited (hereinafter called the Applicant) made pursuant to s.s.(1) of Section 37 of the Municipal Board Act, Statutes of N.S. c.9 requesting the Board to state a case in writing for the opinion of the Appeal Division of the Supreme Court of Nova Scotia on the question of whether or not the Applicant requires a permit from the Board under the provisions of the Shopping Centre Development Act, Statutes of N.S. 1978-79 c.74 to enable the Applicant to enlarge an existing building supplies building by the addition of 30,750 square feet of space, 27,000 of which would be retail floor space for the sale of hardware and 3,750 square feet of mezzanine space for office and related uses. This building is situate on the southwest side of Snow's Road near Provincial Highway No. 3 at Barrington Passage in the County of Shelburne.

Section 37(1) of the Municipal Board Act reads as follows:

> "The Board may of its own motion or upon the application of any party, and upon security being given as the Board directs, state a case in writing for the opinion of the Appeal Division of the Supreme Court upon any question which in the opinion of the Board is a question of law."

The application to the Board was by way of a letter dated October 1983 signed by the Applicant's Solicitors advising the Board that the Applicant intends "to construct a new building containing approximately 30,000 square feet retail floor space to be used as retail hardware store. The Company wishes to know whether such a development requires an approval of the Board under the Shopping Centre Development Act. Whether or not the Development requires such a permit seems to be centered entirely upon the legal question of whether or not the Development is a 'Shopping Centre' within the meaning of Section 2(e) of the Act. The most expeditious manner to have this question of law determined would appear to be by making application to the Appeal Division of the Supreme Court pursuant to Section 37(1) of the Municipal Board Act. Please consider this letter as the application by

Wilson's Shopping Centre Limited to the Board to state in writing the case for the opinion of the Appeal Division".

Enclosed with the application was a draft application and stated case "for review by your solicitor, and, if appropriate, for submission to the Appeal Division".

The Board after a review of the documentation presented by the Applicant formed the opinion that the draft version of a stated case was not in sufficient detail as to the facts for a determination on the issue of law in question. The Board with the consent of the solicitors for the Applicant, then determined to hold a public hearing to ascertain the relevant facts and from an analysis of these facts determine whether or not to state a case to the Appeal Division.

The Shopping Centre Development Act, Stats. of N.S. 1978-79, c.74 received Royal Assent on December 28, 1979. Section 3(1) of this Act states that "no person shall develop a shopping centre without first having obtained the written approval of the Board". s.s.(c) of Section 2 states that "'development' includes any erection, construction or expansion of any building or structure, including any excavation or filling preparatory thereto, and any change or alteration in the use made of land". s.s.(e) of Section 2 states that "'shopping centre' means a development used primarily for the purposes of retail trade and resulting or intended to result in a total of fifty thousand square feet or more of

(i) new retail floor space, or
(ii) new and existing retail floor space where the new retail floor space exceeds ten thousand square feet, including common

> areas and related office and warehouse space but excluding parking areas."

In the opinion of the Board the expansion of the existing building supplies building to be used as a retail store for home hardware products is a "development" within the meaning of a s.s.(c) of Section 2 of the Shopping Centre Development Act.

The issue is whether the development proposed by the Applicant constitutes a "shopping centre" within the meaning of s.s.(e) of Section 2 of the Shopping Centre Development Act. If the proposed development is a "shopping centre" then a permit is required from the Board and the Applicant would be required to make application to the Board under Section 3 of the Shopping Centre Development Act and the Board would be required to conduct a public hearing pursuant to s.s.(1) of Section 5 of that Act. The subject site for the proposed development is not "within a location where a municipal development plan [now known as a municipal planning strategy] approved pursuant to the Planning Act is in effect" and thus is not a case where an application, if required, would have to be made to the council of the Municipality under Section 12(1) of that Act.

Section 11(1) of the Shopping Centre Development Act provides that the Act does not apply to a shopping centre

> "(a) in respect of which the necessary permits for its development were in force and effect on the fourth day of December, 1979;
>
> (b) that is, or is proposed to be, within the development boundary specified in the Halifax-Dartmouth Metropolitan Regional Development Plan; or,

> (c) where an existing shopping centre is to be expanded, provided that such expansion takes place on lands on which the shopping centre is located or intended for use by the shopping centre development and which land was vested in the owner of the shopping centre or his agent as of the fourth day of December, 1979; and further provided that for the purposes of this clause "shopping centre" includes the parking areas ancillary to the shopping centre."

Under s.s.(1) of Section 10 of the Shopping Centre Development Act the Governor in Council may make regulations for a number of purposes including "(c) defining any word or phrase used in this Act and not defined herein". Regulations were made by Order in Council dated March 4, 1980. Section 2 of these regulations reads as follows:

"For the purposes of Section 11 of the Shopping Centre Development Act, 'existing shopping centre' means a shopping centre at least part of the retail floor space in which was open for business on December 4, 1979."

Notice of the hearing held in the Council Chambers of the Municipality of the District of Barrington at Barrington on February 29, 1984, was advertised in the Shelburne Coast Guard by three insertions on February 8, 15 and 22, 1984. A copy of the Notice of Hearing was sent by the Board to the Applicant, the Minister of Municipal Affairs and to the Clerk of the Municipality of Barrington.

The Applicant is a company incorporated in 1954 under the name of Wilson's General Store Limited to take over a general store business located at Barrington Passage. This business had been purchased by one Fred Wilson in 1924. The Company's name was changed to Wilson's Shopping Centre Limited in 1962. The President and controlling shareholder of the Company is Walter Wilson, son of the original proprietor of the business, Fred Wilson.

The Applicant proposes to construct a building to contain approximately 30,750 square feet of floor space as an expansion of its existing building supplies building located on Snow's Road to be used as a retail store for home hardware products. This proposed building is to be located to the northwest of Provincial Highway #3 near the intersection of that Highway with Snow's Road in Barrington Passage.

The Applicant presently owns the following buildings located on the northwest side of Highway #3 and on the southwest side of Snow's Road, viz:-

(1) A home hardware store with storage and offices having a total floor area of 12,590 square feet including a retail floor area of approximately 7,000 square feet.

(2) Two storage buildings containing 400 and 2,833 square feet of floor space respectively.

(3) A building supplies building having a floor area of 7,082 square feet.

The Applicant proposes to demolish the existing home hardware store and office building which is in a serious state of disrepair and the two storage buildings and to construct at an approximate cost of $1,000,000.00 a building to contain 30,750 square feet of retail floor space and offices as an expansion of the existing building supplies building. This building would be located mainly on lands owned at the time of the hearing by Ruth Wilson the title to which would be acquired by the Applicant. The western portion of the proposed building would be located on lands owned by Mr. & Mrs. Lloyd T. Wilson which lands are to be conveyed to the Applicant. These lands are adjacent to the Applicant's lands. The existing Home Hardware and Office building, the two storage buildings and the existing building supplies building are delineated on a plan prepared by D.S. Thorne Survey Associates Limited dated March 17, 1983 entitled "Plan Showing Topographic Survey Lands of Mrs. Ruth Wilson & Wilson's Shopping Centre at Barrington Passage in the County of Shelburne, Province of Nova Scotia", a copy of which was filed as Exhibit W-3. These buildings along with other buildings owned by the Applicant are also shown on a plan prepared by D.S. Thorne Survey Associates Limited dated August 29, 1983 filed as Exhibit W-4.

The plan filed as Exhibit W-4 shows a building containing 25,955 square feet of floor space known as Wilson's Foodland & Drygoods situate at the intersection of the southeast side of Provincial Highway #3 and the southwest side of Ferry Road. This building was constructed in 1962 and was enlarged and modernized in 1977. Appliances have been sold from the basement portion of this building since 1977. Ferry Road joins Provincial Highway #3 directly opposite the existing Home Hardware and Office building. Also shown on Exhibit W-4 at the intersection of the southeast side of Provincial Highway #3 and the northeast side of Ferry Road is a plumbing supplies and service building containing 4,663 square feet of floor space. Exhibit W-4 also delineates a women's fashion shop on the northeast side of Ferry Road adjacent to the plumbing and service building containing 1,554 square feet of floor space. These two last named buildings are located kitty-corner from the Home Hardware & Office building. Finally, the plan filed as Exhibit W-4 delineates a Home Furnishings building containing 10,390 square feet of floor space. This building is located approximately 5 kilometers west of the Foodland & Drygoods building on the southeast side of Highway #3.

The total floor area of the eight buildings owned by the Applicant and delineated on the August 29, 1983 plan marked Ex. D-4 is 65,467 sq. ft. Of this total 10,390 sq. ft. represents the floor area of the Home Furnishings building which, being located on the southeast side of Highway #3 and approximately five (5) kilometers west of the Foodland & Drygoods store is not in the opinion of the Board part of the commercial shopping complex situate at or near the intersection of Snow's Road and Highway #3 because of its physical separation.

The remaining buildings on the plan filed as Exhibit D-4, after excluding the Home Furnishings building, have a floor area of 55,077 sq. ft. (65,467 - 10,390). Of the remaining 55,077 sq. ft., 3,233 sq. ft. comprises storage areas in two buildings, one 2,833 sq. ft. and the other 400 sq. ft. Since storage area is not "retail floor space"one must deduct the floor area of the two storage buildings to arrive at the existing size of the retail floor space, namely 51,844 sq. ft. (55,077 - 3,233). The Applicant's plans are to demolish the two storage buildings on completion of the expansion of the existing building supplies building. The Applicant also plans to demolish the most easterly 400 sq. ft. portion of its building supplies building and retain as a separate building a portion of its present buildings supplies building containing 1,740 sq. ft. of floor space.

The Applicant plans to expand its existing building supplies building by the construction of 30,750 sq. ft. of additional space so as to create one building containing 35,700 sq. ft. of floor space, the main portion of which will be for retail purposes, a portion for receiving the storage of goods and a portion for offices, staff room, boardroom, etc. and 4,950 sq. ft. for building supplies. This building will have its own sewage system and water supply and will also have provision for parking space. The Applicant intends to demolish the existing building containing 12,590 sq. ft. of space used as a Home Hardware store and offices.

The term "shopping centre" as defined in Section 2(e) of the Shopping Centre Development Act means a "development" consisting of an "erection, construction or expansion of any building or structure", as well as "any excavation or filling preparatory thereto, and any change or alteration in the use made of land". Thus the "development proposed by the Applicant consists of the expansion of an existing building supplies building to contain 35,700 sq. ft. of new and existing retail floor space which removes it from the definition of "shopping centre" in the Shopping Centre Development Act which requires a total new and existing retail floor space of at least 50,000 sq. ft. Furthermore, under the definition of "development" in the Statute the words "construction or expansion" relate to "any building or structure", that is, to any one building or structure and not to a number of separate buildings or structures. In the case of the Applicant's proposal the expansion relates only to one building; namely, the building supplies building.

Upon the completion of the Applicant's proposal, the Applicant will have one building on the southwest side of Snow's Road containing 35,700 sq. ft. of space to be used as a Home Hardware retail outlet with offices and ancillary uses as well as the 4,950 sq. ft. of space for building supplies as shown on an architectural drawing prepared by Robert J. Flinn Design Group Ltd. and filed as Ex. W-7. The eastern portion of the existing building supplies warehouse building containing about 1,700 sq. ft. will also remain as a separate building. The two storage buildings next to the existing Home Hardware store and the Home Hardware store itself will have been demolished.

The Applicant after the completion of its proposal will still own and operate the Foodland and Drygoods store on the southeast side of Provincial Highway #3 and will own the plumbing and service building and women's fashion shop also located on the southeast side of the Provincial Highway #3. The plumbing and service building and the women's fashion shop are physically separated from the Foodland and Drygoods store by the Ferry Road and all three of these buildings will be separated from the land on the northwest side of Snow's Road by Provincial Highway #3.

The Applicant called only one witness, Mr. Walter Wilson, the President and controlling shareholder of Wilson's Shopping Centre Limited. Mr. Wilson explained the ownership and use of the various buildings shown on the plan dated August 29, 1983 filed as Exhibit D-4. He also outlined the history of the business operated by the company and the Wilson family back to 1924 when his late father, Fred Wilson purchased a general store.

Walter Wilson explained the reasons for the proposed expansion which basically resulted from increased business in the Home Hardware division of the Company and the dilapidated condition of the present Home Hardware store building.

It is clear to the Board that the proposed development could only be considered a "shopping centre" under the provisions of the Shopping Centre Development Act if the retail area of the Applicant's Foodland & Drygoods store was considered to be part of the same development as the Home Hardware store and the building supplies building. In fact the Foodland & Drygoods store although owned by the Applicant corporation is separately managed, has its own separate parking area, and its own separate water supply. It is also located on a separate parcel of land from the land on which the present hardware store is located or the lands on which the proposed hardware store is to be located and is separated from the other lands by a Provincial Highway. Also the Foodland & Drygoods store property is assessed separately from the lands where the present and proposed hardware store is to be located. The evidence indicates that the hardware store and Foodland and Drygoods business have been separate operations since 1962. The only common element is the common ownership by the Applicant, Wilson's Shopping Centre Limited.

From the facts adduced at the hearing it is the opinion of the Board that the expansion proposal of the Applicant including the demolition of some existing buildings does not constitute a shopping centre within the context of the Shopping Centre Development Act although the Applicant owns and operates at the present time a number of separate businesses or divisions of Wilson's Shopping Centre Limited located on separate parcels of land and situate in one general location near the point where Snow's Road and Ferry Road join Provincial Highway #3.

Mr. Walter Wilson in his testimony stated that the name of his company "Wilson Shopping Centre Limited" was a misnomer. To the extent that the name of the company suggests a shopping centre within the meaning of the Shopping Centre Development Act the Board agrees with Mr. Wilson that the name is a misnomer.

The Applicant in its post hearing brief filed with the Board requests that the Board "determine that the development proposed by Wilson's Shopping Centre Limited does not constitute a 'shopping centre within the meaning of the Shopping Centre Development Act and that, therefore, it is not necessary for the Board to state a case in this matter for the opinion of the Appeal Division of the Nova Scotia Supreme Court".

The Board is of the opinion that it will not state a case as originally requested by the Applicant because of the Board's opinion that the Applicant does not in law require a permit from the Board to carry out the development proposal since the proposed development does not result in either a development used or intended to be used for purposes of retail trade containing 50,000 sq. ft. of new retail space or new and existing retail floor space where the new retail floor space exceeds 10,000 sq. ft.

An order will issue accordingly.

DATED at HALIFAX, NOVA SCOTIA this 17th day of July, 1984.

RHBlois

EALawrence

MEMBERS OF THE NOVA SCOTIA
MUNICIPAL BOARD.